No. 91-1769

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

KATHLEEN SAUNDERS WILLIAMS, INDIVIDUALLY, AND KATHERINE SAUNDERS WILLIAMS, EXECUTRIX OF THE ESTATE OF ELIZABETH GEORGE SAUNDERS, DECEASED,

Petitioners,

v.

FEDERAL LAND BANK OF JACKSON, FEDERAL LAND BANK ASSOCIATION OF JACKSON, AND FARM CREDIT SYSTEM ASSISTANCE BOARD,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

PRESTON DAVIS RIDEOUT, JR.
(Counsel of Record)
Post Office Box 1350
Greenwood, Mississippi 38930
(601) 455-9999

A. LEE ABRAHAM, JR.
ABRAHAM & ASSOCIATES
Post Office Box 8407
Greenwood, Mississippi 38930
(601) 453-3000

Counsel for Petitioners Kathleen Saunders Williams, Individually, and Katherine Saunders Williams, Executrix of the Estate of Elizabeth George Saunders, Deceased

April 30, 1992

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

Whether 12 U.S.C. § 2278a-3(b) is an unconstitutional attempt by Congress to confer Article III jurisdiction in this, a case in which only state common law claims are made and which Petitioner therefore contends does not arise under the Constitution or laws of the United States?

This Petition questions the constitutionality of 12 U.S.C. § 2278a-3(b). The United States Court of Appeals for the District of Columbia has not, pursuant to 28 U.S.C. § 2403(a), certified to the Attorney General that the constitutionality of an Act of Congress has been drawn into question.

PARTIES TO THE PROCEEDING BELOW

The parties in the court below were:

Plaintiffs: Kathleen Saunders Williams, individually,, and Katherine Saunders Williams, Executrix of the Estate of Elizabeth George Saunders, Deceased.

Defendants: Federal Land Bank of Jackson, Federal Land Bank Association of Jackson, and, Farm Credit System Assistance Board, as successor in interest to the Farm Credit System Capital Corporation.

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INTRODUCTION

The Petitioners, Kathleen Saunders Williams, Individually, and Katherine Saunders Williams, Executrix of the Estate of Elizabeth George Saunders, Deceased, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled proceeding on February 4, 1992.

OPINIONS BELOW

The February 4, 1992, opinion of the Court of Appeals for the District of Columbia Circuit is reported at 954 F.2d 774, and is reprinted in the Appendix hereto at 1a.

The Memorandum Opinion and Order of the United States District Court for the District of Columbia is reported at 729 F. Supp. 1387. It is reprinted in the Appendix hereto at 12a.

JURISDICTION

The Petitioner contends there is no jurisdiction over this case in a federal court.

Petitioner's contention notwithstanding, invoking federal jurisdiction under 12 U.S.C. § 2278a-3(b), the Respondent on April 1, 1988, removed this suit from the Circuit Court of Leflore County, Mississippi, to the United States District Court for the District of Columbia. The Defendants answered Williams' Amended Complaint and then moved to dismiss it for failure to state claims upon which relief could be granted. The District Court granted the Defendants' motion on January 31, 1990.

On appeal by the Petitioners herein, the United States Court of Appeals for the District of Columbia Circuit entered an opinion affirming the dismissal on February 4, 1992.

The jurisdiction of this Court to review the judgment of the District of Columbia Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

12 U.S.C. § 2278a-3(b)

> Notwithstanding any other provision of law, any civil action . . . to which the Assistance Board is a party shall be deemed to arise under the laws of the United States, and the United States District Court for the District of Columbia shall have exclusive jurisdiction over such. The Assistance Board may . . . remove any such action . . . from a State court to the United States District Court for the District of Columbia.

STATEMENT OF THE CASE

A. Facts Giving Rise to the Claim[1]

In 1981 Katherine Saunders Williams and her mother, Elizabeth George Saunders, used Runnymede Plantation, their 1400-acre farm in Leflore County, Mississippi, as security for a loan of $1,309,000. They borrowed this sum through the Federal Land Bank Association of Greenwood (predecessor in interest to defendant Federal Land Bank Association of Jackson), which serviced loans for the Federal Land Bank of New Orleans (predecessor in interest to defendant Federal Land Bank of Jackson).[2]

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[1] Excerpted (with some additions and changes) from the Circuit Court of Appeals decision at Appendix B, pp. 40a through 43a.

[2] By 1987, the year in which the events at issue occurred, the Federal Land Bank of Jackson had begun receiving financial help from the Farm Credit System Capital Corporation. See Farm Credit Amendments Act of 1985, Pub. L. No. 99-205,

(Continued on following page)

Williams and Saunders farmed their land through boom times, then bust, and six years later they owed $1,236,016.50.

On March 17, 1987, Williams and Saunders told the Federal Land Bank Association of Jackson that they wanted to sell Runnymede Plantation to a Duncan Williams for $1,450,000, or about $999 an acre, and to use some of the proceeds to reduce their debt to $422,183.10. They proposed to secure the remaining debt with a lien on several other of their assets, including land worth, according to Williams and Saunders, $320,000. The Land Bank Association, on behalf of the Land Bank, and at the direction of the Farm Credit System Capital Corporation rejected the proposal.

Saunders died on April 12. On April 14 Williams told the Land Bank Association that she wanted to sell Runnymede and the highway tract together to a Jimmy Henderson for a total of $1,600,000, or about $903 an acre, and to use some of the proceeds to extinguish her debt. The Land Bank Association took the proposal under advisement. According to Williams, the Capital Corporation told the Land Bank Association to wait. On June 20 the Land Bank Association approved the offer on behalf of the Land Bank. The sale closed on July 17, and Williams paid off her debt in full.

On December 22, 1987, Williams brought this action in the Circuit Court of Leflore County, individually and as executrix of her mother's estate, against the Land Bank, the

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(Continued from previous page)

§ 103, 99 Stat. 1678, 1680-87 (codified at 12 U.S.C. §§ 2216-2216k) (creating the Farm Credit System Capital Corporation to bail out financial institutions within the farm credit system), repealed by Agricultural Credit Act of 1987, Pub. L. No. 100-233, tit. II, § 207(a)(3), 101 Stat. 1568, 1607 (1988).

Land Bank Association, and the Capital Corporation, charging the defendants with various common law torts and breaches of contract arising from their response to the two offers. Williams asked for compensatory damages totaling $1,003,836.76. This included the $139,107.37 ($96 per acre) difference between the Duncan Williams and Jimmy Henderson bids; $175,672.17 for cotton crop profits lost because the Capital Corporation's position created uncertainty which in turn blocked access to production financing; unnecessary interest in the amount of $79,057.22; $110,000 lost in an estate dispute; and, $500,000 in damages for emotional distress. (For a complete breakdown of damage see Appendix A at 11a through 13a.)

On January 21, 1988, the Farm Credit System Assistance Board replaced the Capital Corporation as a defendant as a consequence of statutory changes,[3] and on April 1, the Assistance Board removed the case to the United States District Court for the District of Columbia. On May 20, the Farm Credit Administration, the independent agency atop the farm credit system, declared the Land Bank and the Land Bank Association insolvent and placed them in the hands of receivers.

Important to the adjudication of this case is to remember the fact that the only claims made by Williams and Saunders against the Temporary Assistance Corporation and the Federal Land Bank are all common law

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[3] See Agricultural Credit Act of 1987, Pub. L. No. 100-23, tit. VI, § 60, 101 Stat. 1568, 1585 (1988) (codified at 12 U.S.C. § 2278a) (replacing the Capital Corporation with the Assistance Board); *id.* tit. VI, § 6.3(b), 101 Stat. at 1587 (codified at 12 U.S.C. § 2278a-3(b)) (giving the Assistance Board removal power); see also *id.* tit. IV, § 401, 101 Stat. at 1622 (merging Federal Land Banks and Federal Intermediate Credit Banks to form Farm Credit Banks).

lender liability claims including breach of a cooperative's duties to its members, breach of contract, breach of the implied covenant of good faith and fair dealing, tortious breach of the duty of good faith and fair dealing, negligent delay in closing the sale, intentional and/or negligent infliction of mental distress, intentional interference with a contract and business expectancy and unlawful lender control. (See Appendix A at 28a through 36a.)

B. The Farm Credit System Assistance Board

The Farm Credit Amendments Act of 1985, P.L. 99-205, 99 Stat. 1678, reorganized the Farm Credit Administration with the goal of making it an arms-length regulator of the Farm Credit System. It set up the current structure of the Farm Credit Administration Board and also provided that agency increased regulatory powers. Based on the theory that the financially stronger elements of the Farm Credit System should assist the institutions experiencing financial stress, it created a new entity, the Farm Credit System Capital Corporation. The 1985 Act authorized a "backup" federal line of credit for the Farm Credit System but provided that federal credit could be tapped only after the resources of the stronger federal land banks had been used through a "self-help" mechanism. To implement this Congress authorized the Capital Corporation to "require other institutions of the Farm Credit System through purchase of stock in or obligations of, the Capital Corporation, to make funds available to the Capital Corporation to enable it to make financial assistance available to institutions of the Farm Credit System. . . . " *Federal Land Bank of Springfield v. Farm Credit Admin.*, 676 F. Supp. 1239, 1242 (D. Mass 1987); and,

Central Kentucky Production Credit Ass'n v. U.S., 846 F.2d 1460, 1461 (D.C. Cir. 1988). *See also* Senate Report 100-230 at page 11 (Nov. 19, 1987).

The continuing deterioration in the system's financial condition, pressures to reduce the system's loan interest rates to more competitive levels and litigation filed to block the "self-help" provisions all led to changes in the 1985 legislation less than a year later. In October, 1986, the Farm Credit Act Amendments of 1986 (P.L. 99-509) were enacted. The most important provision of the 1986 amendments allowed each Farm Credit System institution to treat its bad loans, for accounting purposes, as assets and write them off over twenty (20) years. Since this measure failed to comply with generally accepted accounting principles ("GAAP"), it was euphemistically called a "regulatory accounting practice." Senate Report 100-230 at page 11. (Nov. 19, 1987).

Unable to stem the tide of red ink with "regulatory accounting practices" and facing mounting pressures from the solvent Farm Credit System institutions which did not want to bail out the insolvent institutions under the "self-help" theory, Congress passed the Agricultural Credit Act of 1987, P.L. 100-233, 101 Stat. 1568 (Jan. 6, 1988).

The financial assistance package which Congress arrived at is explained in Senate Report 100-230 at pages 22-25 (Nov. 19, 1987) and in House-Senate Conference Report 100-490 at pages 180-194 (Dec. 18, 1987). Basically, Congress set up two entities. First, it chartered the Farm Credit System Assistance Board. See: 12 U.S.C. §§ 2278a through 2278a-13. The Assistance Board operates under a

three-member Board of Directors which includes the Secretary of the Treasury, Secretary of Agriculture and one agricultural producer appointed by the President, by and with the advice and consent of the Senate. 12 U.S.C. § 2278a-2. The Assistance Board has the normal corporate powers including the power to hire, promote, compensate and discharge officers and employees, prescribe a set of by-laws, enter into contracts, acquire, hold, lease and dispose of real and personal property, and the right to "sue and be sued in its corporate name, and complain and defend in courts of competent jurisdiction." 12 U.S.C. § 2278a-3.

The stated purpose of the Assistance Board is "to carry out a program to provide assistance to, and protect the stock of borrowers of, the institutions of the Farm Credit System, and to assist in restoring system institutions to economic viability. . . . " 12 U.S.C. § 2278a-1. Unlike the Capital Corporation, the Assistance Board is prohibited from "management, administration, or disposition of any loans or other assets owned by other system institutions" and it is also prohibited from "providing . . . technical assistance or other related services to other system institutions in connection with the administration of loans owned by such other institutions." 12 U.S.C. § 2278a-8. The Assistance Board is authorized to issue its own regulations, policies, procedures and guidelines and it is not subject to regulation by the Farm Credit Administration. 12 U.S.C. § 2278a-10. The authority for the Assistance Board's existence expires on December 31, 1992. 12 U.S.C. § 2278a-12. The Assistance Board, by

statute, has succeeded to the assets and all "debts, obligations, contracts and other liabilities of the Capital Corporation." 12 U.S.C. § 2278a-9.[4]

An entity related to the Assistance Board which was also set up by Congress in the Agricultural Credit Act of 1987 (and one which must be understood in order to understand the role of the Assistance Board) is the Financial Assistance Corporation ("FAC"). See: 12 U.S.C. §§ 2278b through 2278b-11. (The FAC is not a defendant in this litigation.) The Board of Directors for the FAC is the same as the existing Board of Directors for the Farm Credit System Funding Corporation. 12 U.S.C. § 2278b-2. FAC is owned by the Federal Land Banks and Production Credit Associations which are the private institution members of the Farm Credit System. To insure that they maintain ownership FAC has issued non-transferrable stock to these institutions. 12 U.S.C. § 2278b-3. Much like the Assistance Board, FAC has been given the standard corporate powers needed to conduct business such as the power to provide for staff and salaries, establish by-laws, enter into contracts, borrow on its own individual responsibility and the right to "sue and be sued in its corporate name and complain and defend in courts of competent jurisdiction." 12 U.S.C. § 2278b-4.

To facilitate assistance to the financially ailing Federal Land Banks, FAC was authorized to establish an account or revolving fund called the Farm Credit Assistance Fund. This fund has been capitalized through the

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[4] It is by virtue of this statute that the Assistance Board replaced the Capital Corporation as a defendant in this litigation.

issuance of fifteen-year debt obligations by FAC, payments of interest from the Secretary of the Treasury and through payment of interest by Farm Credit System institutions. Monies in the fund not needed for current operations are invested in direct obligations of the United States or obligations guaranteed by the United States. 12 U.S.C. § 2278b-5. The expenses incurred by the Assistance Board are paid from the Farm Credit Assistance Fund. 12 U.S.C. § 2278a-7(a). FAC has also established an account called the Financial Assistance Corporation Trust Fund which has been capitalized by funds received from a one-time assessment (i.e., one-time stock purchase) made against Farm Credit System institutions. 12 U.S.C. § 2278b-9. These trust funds are to be held for use in paying any defaults by Farm Credit System institutions in repaying the Financial Assistance Corporation. 12 U.S.C. § 2278b-6(d)(3).

FAC was authorized by the Act to issue Four Billion Dollars in uncollateralized bonds and similar obligations guaranteed by the Secretary of the Treasury, with annual coupon payments and a maturity period of fifteen years. 12 U.S.C. § 2278b-6(a).

During the fifteen years following issuance of the obligations; FAC is responsible for paying the annual interest charges on all debt obligations. However, during the first five years, the corporation will, subject to appropriation by Congress, receive the full amount of interest payment due from the United States. During the second five years, the corporation will receive fifty percent (50%) of the interest due from the Treasury, with FCS institutions paying the other 50% and during the third five year period, FCS institutions will pay FAC the entire amount

of interest due on the obligations. 12 U.S.C. § 2278b-6(c). As soon as financially able, Farm Credit System institutions will be required to repay the Treasury all interest payments made by the United States. 12 U.S.C. § 2278b-6(c)(5). When the fifteen year debt obligations mature, the principal will be repaid by FAC. So that FAC may repay these obligations, each FCS institution that issued and sold preferred stock to FAC (to obtain financial assistance under the Act) must pay the corporation, prior to the maturity of the obligation, the dollar value of such outstanding preferred stock at par value. 12 U.S.C. § 2278b-6(d).

If a Farm Credit System institution defaults on the payment of interest during the first fifteen years after the obligations are issued, the FAC will be required to pay the amount of interest due out of the Trust Fund. If FAC is unable to recover the interest due from the defaulting FCS institution, all uncollected interest will be repaid to the Trust Fund out of the reserve account and if that account is insufficient, the remaining interest is to be added to the amount of interest otherwise due by all remaining Farm Credit System Institutions on a proportionate basis. 12 U.S.C. § 2278b-6(d)(3).

If FAC determines that an FCS institution will be unable to redeem the preferred stock at par value in a timely manner and remain viable, the corporation is required to withdraw funds from the Trust Fund to repay the stock. If the Trust Fund is insufficient, the reserve account will be used to purchase the preferred stock. If the reserve account is insufficient, the Secretary of the Treasury will be required to make up the difference by

purchasing additional preferred stock issued by the institution. In each case in which the Treasury is required to purchase preferred stock because of a default on principal payments, the Reserve Account Board is required to use funds deposited in the reserve account to repurchase, at par value, such stock from the Secretary of the Treasury as funds become available. 12 U.S.C. § 2278-b(d)(4).

The defendant in this case is not FAC, it is the Assistance Board. The Assistance Board's role in this process is relatively simple. When a Farm Credit System institution's stock is impaired (based on generally accepted accounting principles), the FCA must notify the Assistance Board, and the Board must begin monitoring the institution's financial condition and business and operating plans. The institution may apply for assistance when the book value of its stock is below par value (based on generally accepted accounting principles). When the value of its stock has declined to 75% (based on generally accepted accounting principles) of par value, the institution must apply for assistance, and the Assistance Board must make a decision whether or not to provide assistance. 12 U.S.C. § 2278a-4.

When an institution has been certified by the Assistance Board to issue preferred stock to be purchased by FAC (12 U.S.C. § 2278b-7(b)), the Assistance Board may provide assistance in one or more of the following ways:

1. Authorizing the institution to issue preferred stock in amounts necessary to maintain the book value of stock at the 75% level;

2. In the case of high cost debt for which the institution is primarily liable, authorizing the institution to

issue preferred stock in an amount equal to the premium that would be required by the holder of the debt for the institution to retire the debt at current market value;

3. At the request of the institution, authorizing the issuance of preferred stock to facilitate the merger of the requesting institution with one or more other system institutions; and,

4. Providing assistance by such other methods as the Assistance Board determines appropriate. 12 U.S.C. § 2278a-5.

The Assistance Board also has the authority to:

1. Require the institution to obtain approval from the Assistance Board before implementing business, operating, and investment plans and policies;

2. Direct the Farm Credit Administration Board to appoint a conservator for the institution;

3. Request the Farm Credit Administration Board to approve or require a merger or consolidation of the institution or initiate action to appoint a receiver;

4. Require the institution to obtain approval from the Assistance Board before setting the terms and conditions of any debt issuance;

5. Require the institution to obtain approval from the Assistance Board before setting policy on credit standards;

6. Require the institution to obtain approval from the Assistance Board for the design of management information and accounting systems;

7. Require that the plans and policies of the institution resulting from the merger of system banks reduce the overhead costs of such institution, to the maximum extent practicable;

8. Require the institution to obtain approval from the Assistance Board of its hiring policies, compensation and retirement benefits of executives, any change in management of the institution, and policy decisions regarding continued employment and promotion of executives;

9. Suspend for any period of time, or terminate any certification granted (i.e., certification of eligibility to issue preferred stock under 12 U.S.C. § 2278a-4) if the FCA notifies the Assistance Board that the institution has substantially deviated from the institution's business plan or has failed to comply with a term or condition governing the use of any financial assistance provided to the institution; and,

10. Take such other action as the Assistance Board determines may be necessary to establish prudent operating practices at the institution and to return the institution to a sound financial condition. 12 U.S.C. § 2278a-6.

Finally, it should be noted that each Federal Land Bank is fully liable for all principal and interest on notes, bonds, debentures, or other obligations issued by it individually, and is also liable for the interest payments on all long term notes, bonds, debentures, or other obligations issued by other member banks of the Farm Credit System. 12 U.S.C. § 2155(a). Each bank is also primarily liable for a portion of any issue of consolidated or system-wide obligation made on its behalf. 12 U.S.C. § 2155(a)(2)(A). However, the United States shall not be liable and is not

authorized to assume any liability, either direct or indirect, on any such obligations. 12 U.S.C. § 2155(c).

C. The District Court's Decision

The defendants answered Williams' amended complaint and then moved to dismiss it for failure to state claims upon which relief could be granted. The district court granted the defendants' motion. *Williams v. Federal Land Bank*, 729 F. Supp. 1387 (D.D.C. 1990), and Williams appealed. Appendix C, pp. 52a-59a.

D. The Court of Appeals Decision

The only portion of the Appeals Court decision relevant to this Petition is whether Article III "arising under" jurisdiction exists. In this regard the Appeals Court in interpreting 12 U.S.C. § 2278a-3(b) said:

> Congress's clear intention – to create federal jurisdiction over all cases to which the Assistance Board is a party – prevails if the Constitution permits.
>
> Article III, section 2 provides that the judicial power "shall extend to all Cases . . . arising under . . . the Laws of the United States." These include cases to which a federal instrumentality is a party, on the theory that the provision creating the entity is potentially at issue in every such case. See *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 822-28 (1824). The Supreme Court has already found federal land banks and federal land bank associations to be federal instrumentalities. See *Knox Nat'l Farm Loan Ass'n v. Phillips*, 300 U.S. 194, 202 (1937)

(federal land bank association, for purposes of susceptibility to state court winding-up procedures); *Federal Land Bank v. Priddy*, 295 U.S. 229, 231-32 (1935) (federal land bank, for purposes of susceptibility to judicial process absent express congressional provision). As the Assistance Board was created and empowered by Congress to refinance the land banks, it would be surprising if, regardless of other characteristics, it were not also a federal instrumentality. Indeed, Congress has expressly declared it to be "a Federally chartered instrumentality of the United States", 12 U.S.C. § 2278a(a), and Congress is the sole source of "all the faculties and capacities which [it] possesses," *Osborn*, 22 U.S. at 825. Under the logic of *Osborn*, this would seem to be enough. For what it may be worth, however, we note a little of the very broad scope of federal involvement. The Board is directed by presidential appointees (two of whom are cabinet members); its officers and employees are "hired, promoted, compensated and discharged in accordance with title 5, United States Code", see, e.g., Pub. L. No. 101-161, Title V, 103 Stat. 981 (Nov. 21, 1989); it is exempt from most taxes, see 12 U.S.C. § 2278a-11; and the Treasury guarantees the principal of its bonds, see *id.* § 2278b-6. It seems clear that the Assistance Board is a federal instrumentality for purposes of finding under *Osborn* that actions to which it is a party arise under the federal law.

Appendix B, pp. 43a-44a; reported at 954 F.2d 774.

ARGUMENT

THIS IS NOT A CASE "ARISING UNDER" THE LAWS OF THE UNITED STATES AND THUS FEDERAL COURTS HAVE NO ARTICLE III JURISDICTION

A. The Constitutionality of Any Statute is Subject to Judicial Review

The Assistance Board removed this case from the Circuit Court of Leflore County, Mississippi, to the United States District Court for the District of Columbia based on 12 U.S.C. § 2278a-3(b).

Even though this statute states that any action against the Assistance Board is "deemed to arise under the laws of the United States," thus, providing the District Court with federal question jurisdiction, whether any particular action does or does not, in fact, "arise under the laws of the United States" is a matter open to judicial review. "Congress . . . cannot . . . be the final judge of its own power under the Constitution." *Baltimore & O. R. Co. v. United States*, 298 U.S. 349, 364, 80 L. Ed. 1209, 1221 (1935). Any statute that would preclude judicial review "would be flatly inconsistent with the doctrine of separation of powers implicit in our Constitutional scheme." *Bartlett v. Bowen*, 816 F.2d 695, 706 (D.C. Cir. 1987).

B. *Osborn v. Bank of the United States* and its Progeny

This Court in *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 6 L. Ed. 204 (1824) interpreted a national bank's charter which stated in part:

> "[T]he bank shall be 'made able and capable in law' – 'to sue and be sued, plead and be impleaded, answer and be answered, defend and be defended, in all state courts having competent jurisdiction and in any circuit court in the United States." *Id.*, 22 U.S. at 817, 6 L. Ed. at 223.

The Court decided two issues relating to this charter. First, did the federal courts have jurisdiction to hear the case? Second, did Congress have the Constitutional authority to confer this jurisdiction? The Court held that the charter's language conferred federal jurisdiction over all cases in which the bank was a party, and that Congress had the power to grant this jurisdiction.

The Court reasoned that because a federal charter created the bank, the bank could only act under federal law. When it sued, the first question had to be whether federal law gave it power to sue. Every suit involving the bank arose under federal law because the suit had to arise under the federal charter. *Id.*, 22 U.S. at 823-824, 6 L. Ed. at 224.

To the extent *Osborn* held that federal incorporation alone created federal jurisdiction, it has been overruled by 28 U.S.C. § 1349 which states that district courts have no jurisdiction on the basis of federal incorporation unless the United States owns more than one-half (1/2) of the corporation's capital stock. The Respondent in this case, the Assistance Board, does not issue stock.

Osborn has been further eviscerated by the this Court's holding in *Gully v. National Bank in Meridian*, 299 U.S. 109, 81 L. Ed. 70 (1936). In *Gully* the state of Mississippi, based on a state taxing statute, sought to recover a money judgment against the First National Bank in

Meridian. The bank removed to federal court alleging federal question jurisdiction because a federal statute had consented to the taxation. This Court found no federal question and ordered a remand to state court. Citing *Osborn* the Court said:

> "Looking backward we can see that the early cases were less exacting than the recent ones in respect of some of these conditions. If a federal right was pleaded, the question was not always asked whether it was likely to be disputed. This is seen particularly in suits by or against a corporation deriving its charter from an act of Congress." *Id.*, 229 U.S. at 113, 81 L. Ed. at 72.

The Court held that in order for federal question or "arising under" jurisdiction to exist:

> " . . . a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause. . . . The right or immunity must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another. . . . A genuine and present controversy, not merely a possible or conjectural one, must exist . . . , and the controversy must be disclosed upon the face of the complaint, unaided by the answer or by the petition for removal." *Id.*, 229 U.S. at 112-113, 81 L. Ed. at 72.

Stated another way, the test for determining whether federal question "arising under" jurisdiction is present is whether the plaintiff's complaint "will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another." *Wheeldin v. Wheeler*, 373 U.S. 647, 83 S. Ct. 1441,

10 L. Ed. 2d 605, 610 (1963) (a federal common law claim against an individual investigator for money damages for abuse of subpoena power or process for subpoenaing someone to testify before the House Committee on Un-American Activities.)

Recognizing that Article III federal question jurisdiction has an outer limit, Congress provided that the FSLIC (now superseded by the RTC) could remove any suit to federal court *except* those suits where FSLIC was acting as a conservator or receiver for a state chartered S & L and only rights and obligations under state law were involved. 12 U.S.C. § 1730(k) (now repealed). Recognizing the same outer limit of Article III federal question jurisdiction, the Congress has placed the same prohibition on removal in the case of the FDIC acting as a receiver for a state insured depository institution in a case which involves only the interpretation of state law. 12 U.S.C. § 1819(b)(2)(D).

In the case at bar there is no federal "issue" within the meaning of *Gully*. The Assistance Board's only connection to this litigation is by virtue of the fact that by act of Congress it is now legally responsible for the obligations of the Capital Corporation. 12 U.S.C. § 2278a-9. In all respects it stands in the same position as the FSLIC or FDIC acting as a receiver. It is a defendant in this litigation not because of any act or omission on its own part but simply to wind up the affairs of the Capital Corporation. All the plaintiff's claims in this case are based on state common law. This case contains no dispute of federal law. The Assistance Board does not contest the fact that it is liable for the obligations of the Capital corporation. There is no "genuine and present controversy"

regarding "a right or immunity created by the Constitution or laws of the United States." *Gully, supra*, 229 U.S. at 112, 81 L. Ed. at 72.

C. The *Propeller Genesee Chief* and its Progeny

In the *Propeller Genesee Chief v. Fitzhugh*, 12 How. 443, 13 L. Ed. 1058 (1852), this Court considered the constitutionality of a statute granting federal courts jurisdiction over vessels on the Great Lakes. The government argued, among other things, that this statute itself constituted a regulation of commerce under the commerce clause of the Constitution and it thus furnished Article III, Section 2 "arising under" jurisdiction. This Court while upholding the statute as an exercise of maritime jurisdiction under Article III, Section 2, held that it was not a regulation of commerce, "it merely confers a new jurisdiction on the district courts; and this is its only object and purpose." 12 How., at 451, 13 L. Ed. at 1062. The rule of the *Genesee Chief* is this: In order for a statute conferring federal question subject matter jurisdiction on a federal court to pass constitutional muster under Article III, Section 2, there must also exist a separate body of substantive federal law "arising under" the Constitution or laws of the United States. Put another way: Congress cannot by statute confer federal question jurisdiction over a subject matter which does not, absent the jurisdictional statute, "arise under" the laws or Constitution of the United States.

In *Verlinden v. Central Bank of Nigeria*, 461 U.S. 480, 76 L. Ed. 2d 81, 103 S. Ct. 1962 (1983), this Court discussed whether Congress had exceeded Article III, Section 2

"arising under" jurisdiction by providing jurisdiction over civil suits by foreign plaintiffs against foreign sovereigns when only state law issues were involved. This Court in *Verlinden* held that 28 U.S.C. § 1331 "arising under" jurisdiction is much narrower than Article III, Section 2 "arising under" jurisdiction, Congress may not expand jurisdiction beyond the limits of the Constitution and Congress may not confer jurisdiction on federal courts simply by passing a jurisdictional statute. Citing the *Genesee Chief*, the court held that "arising under" jurisdiction may not be based on a Congressional enactment granting jurisdiction, it must be based on a body of federal law arising either under the Constitution or the laws of the United States. 76 L. Ed. 2d at 94-95. The Court in *Verlinden* upheld the Congressional grant of jurisdiction because Congress, pursuant to its unquestioned Article I powers had enacted a broad statutory framework governing the immunity of foreign sovereigns. It held that this body of substantive law furnished a sufficient basis for "arising under" Article III, Section 2 jurisdiction to support the jurisdictional statute (28 U.S.C. § 1330(a)) which granted jurisdiction to district courts over civil actions against a foreign sovereign. *Id.*

This Court next addressed the question in *Mesa v. California*, 489 U.S. ___, 109 S. Ct. 959, 103 L. Ed. 2d 99 (1989). In this case two United States Postal Service employees were charged with traffic violations while operating their mail trucks and were arraigned in California municipal court. The federal government removed the case pursuant to 28 U.S.C. § 1442(a) which, in pertinent part, provides:

> "A civil or criminal prosecution commenced in a State court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:
>
> > (1) any officer of the United States or any agency thereof . . . for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue. . . . "

After reviewing the holding in *Verlinden*, the Court held:

> "Section 1442(a), . . . is a pure jurisdictional statute, seeking to do nothing more than grant district court jurisdiction over cases in which a federal officer is a defendant. Section 1442(a), therefore, cannot independently support Article III 'arising under' jurisdiction. Rather, it is the raising of a federal question in the officer's removal petition that constitutes the federal law under which the action against the federal officer arises for Article III purposes. The removal statute itself merely serves to overcome the 'well pleaded complaint' rule which would otherwise preclude removal even if a federal defense were alleged. . . . (under the 'well pleaded complaint' rule '[a] defense that raises a federal question is inadequate to confer federal jurisdiction'). . . . " *Mesa v. California, supra*, 103 L. Ed. at 114.

Judging the statute under which the Assistance Board removed this case to the District Court for the District of Columbia (12 U.S.C. § 2278a-3(b)) in light of the holdings in the *Propeller Genesee Chief, Verlinden* and *Mesa*, the

Court must come to the inescapable conclusion that it is a merely jurisdictional statute and there is no body of federal substantive law governing these common law lender liability claims, and no federal question within the meaning of *Gully* upon which Article III, Section 2 federal question jurisdiction may be predicated.

D. The Fact that the Assistance Board is a Corporation Chartered by Congress Does Not Create Article III, Section 2 "Arising Under" Jurisdiction

Citing two cases the District of Columbia Court of Appeals found that Federal Land Banks and Federal Land Bank Associations are federal instrumentalities. *Knox Nat'l Farm Loan Ass'n v. Phillips*, 300 U.S. 194, 202 (1937); and, *Federal Land Bank v. Priddy*, 295 U.S. 229, 231-32 (1935). (See the Court of Appeals decision at Appendix B, at p. 44a.) In *Knox*, this Court held that being a creature of Congress, a Federal Land Bank could not be liquidated pursuant to state law but rather could be liquidated only by the Farm Credit Administration which Congress had vested with this authority. In *Priddy* this Court held that even though the Federal Land Bank of St. Louis was a federal instrumentality, because it possessed many of the characteristics of a private business corporation, it was subject to suit in an Arkansas state court by a real estate broker seeking to recover a real estate commission. The Circuit Court of Appeals simply misinterpreted the holdings in *Knox* and *Priddy*. Nor did the Court of Appeals understand the Assistance Board. Contrary to the factual findings of the Court of Appeals, the Assistance Board was not created by Congress to refinance Land Banks and

the Treasury does not guarantee Assistance Board bonds. (See Appendix B at 44a.) The Financial Assistance Corporation issues the bonds and even though the Treasury will pay some interest, as soon as they are able the Farm Credit System banks will be required to repay the Treasury. § 2278b-6(c)(5).

Recent cases hold just the opposite from the way the Court of Appeals interpreted *Knox* and *Priddy*. In *Federal Land Bank of Columbia v. Cotton*,[5] a case removed simply because of the federal charter, the Court remanded for lack of federal jurisdiction saying: "The . . . bank . . . was obviously meant to be a private, rather than governmental, corporation which would merely be subject to various federal regulations. . . . " *Id.* at 171. In *Federal Land Bank v. Federal Intermediate Cr. Bank*[6] the court found no Article III jurisdiction and remanded a common law dispute to state court holding that Federal Land Banks are citizens of the states in which their principal office is located and "are not considered federal agencies." *Id.* at 1056-1057.

Even though the Assistance Board is chartered by Congress, its function is clearly private. Its main purpose is to assist the Farm Credit System by supervising the operation of (not by loaning money as FAC does) its financially weak, private member institutions. A secondary purpose and the one involved in this case is to wind up the affairs of the Capital Corporation. A similar set of

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[5] 410 F. Supp. 169 (N.D. Ga. 1975)

[6] 727 F. Supp. 1055 (S.D. Miss. 1989)

facts is found in *Hancock v. Federal Savings and Loan Insurance Corp.*, 492 F.2d 1325 (9th Cir. 1974). In this case FSLIC was acting as a receiver of an insured state chartered S & L. Hancock sued in United States District Court to enjoin FSLIC from selling the S & L's assets. It predicated 28 U.S.C. § 1331 federal question jurisdiction on the grounds that the FSLIC was created as a federally chartered corporation under 12 U.S.C. § 1725. Finding this to be an inadequate basis for federal question jurisdiction, the Ninth Circuit Court of Appeals said:

> "Although at one time the United States owned all of the stock of the FSLIC, that stock has been retired since 1958, and at the present time there is no outstanding stock to be owned. . . . [W]e hold that jurisdiction is not conferred over the FSLIC merely because it is a federally chartered corporation whose entire stock once was owned by the United States." 492 F.2d at 1328.[7]

A similar situation arose in *Heidt v. Mid-State Federal Savings and Loan Association*, 594 F. Supp. 695 (M.D. Fla. 1984). In this case the plaintiff sued the defendant S & L alleging that a "due on sale" clause violated the mortgage itself, state law and federal regulations promulgated by the Federal Home Loan Bank Board. The Plaintiff sought declaratory and injunctive relief and the S & L removed alleging federal question "arising under" jurisdiction under 28 U.S.C. § 1331. The District Court remanded

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[7] In this case because it issues no stock, the United States owns no stock in the Assistance Board.

saying, among other things, "defendant's status as a federally chartered savings and loan is an insufficient basis for federal question jurisdiction." 594 F. Supp. at 696.

Although the Veterans of Foreign Wars is a federally chartered corporation, a controversy as to whether its constitution or by-laws controls a given set of facts does not "arise under" federal law and does not create federal question jurisdiction. *Crum v. Veterans of Foreign Wars*, 502 F. Supp. 1377 (D. Del. 1980). Likewise, even though the American Red Cross is a federally chartered corporation, this does not create federal question jurisdiction in a case where the plaintiff alleges negligence in giving her blood tainted with the HIV virus. *Anonymous Blood Recipient v. William Beaumont Hospital*, 721 F. Supp. 139 (E.D. Mich. 1989).

Therefore, even though the Assistance Board received its corporate charter from Congress, since its purpose is private in nature, its Congressional charter creates no federal question jurisdiction under either 28 U.S.C. § 1331 or Article III, Section 2.

CONCLUSION

The Resolution Trust Corporation, successor in interest to the FSLIC, has the same rights of removal in S & L cases to the District Court for the District of Columbia as the Assistance Board has in Capital Corporation cases. 12 U.S.C. § 1441a(1)(3). According to a recent *The National Law Journal* article, upwards of a hundred cases have been removed to the District of Columbia, "with the potential for many more to come." "A New S & L Venue

Game," *The National Law Journal* at 13-14 (Jan. 14, 1991). The article goes on to say:

> "Indeed it seems difficult to fathom why Congress would afford the RTC the right to remove to the District of Columbia every state court case in which the RTC finds itself a party in its capacity as successor-in-interest to the affairs of a troubled thrift, when there is no central federal matter at issue in the large majority of these cases. In fact, these cases are often purely local in nature.
>
> . . .
>
> Regardless of rationale, though, litigants throughout the United States are hardly pleased to learn that their cases summarily can be removed to Washington, D.C. by the RTC. Similarly, the federal judiciary in Washington, faced with an influx of such cases, is equally, if not more, disenchanted. Indeed Stanley Harris, a District of Columbia federal judge, looking toward corrective clarification, reportedly has called for the amendment of this FIRREA provision. . . .
>
> . . .
>
> Accordingly, even if the District of Columbia federal court is able to digest this increased case load, the fundamental question remains: Is it fair to litigants who find themselves faced with the prospect of pursuing localized claims in what often will be a geographically remote forum in the nation's capital?" (A copy of this article is attached as Appendix D.)

Judge Gesell has dealt with the problem by reading the RTC removal statute *in pari materia* with the *forum non conveniens* statute, 28 U.S.C. § 1404(a) and transferring the cases back to the district from whence they came. *Asbury v. Germania Bank*, ___ F. Supp. ___, 1990 W.L. 212358 (D.C. D.C. 1990) (copy attached as Appendix E); and, *United Sav. Bank v. Rose*, ___ F. Supp. ___, 1990 W.L. 213057 (D.C. D.C. 1990) (copy attached as Appendix F).

The Petitioner, Katherine Williams, contends there is a better way to deal with her case as well as the hundreds of RTC cases which have been removed to the District Court for the District of Columbia. In a case such as hers where all the issues arise from state common law, there is no federal question jurisdiction within the meaning of Article III, Section 2 of the Constitution. There is no element or "ingredient" of her cause of action such that her claims "will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another." *Gully v. First National Bank in Meridian, supra*, 81 L. Ed. at 72. The removal statute relied upon, 12 U.S.C. § 2278a-3(b), is a jurisdictional statute only. There is no body of federal constitutional or statutory law upon which to base federal question jurisdiction and decide these common law claims and there is no federal defense supporting removal as required by *Mesa v. California, supra*. For these reasons this Court should grant this petition for certiorari and upon a hearing, this case should be remanded to the

Circuit Court of Leflore County, Mississippi, for lack of subject matter jurisdiction.

Respectfully submitted,

/s/ PRESTON DAVIS RIDEOUT, JR.
PRESTON DAVIS RIDEOUT, JR.

OF COUNSEL:

PRESTON DAVIS RIDEOUT, JR.
Post Office Box 1350
Greenwood, Mississippi 38930
(601) 455-9999

Attorney for Petitioners

April 30, 1992

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

KATHLEEN SAUNDERS WILLIAMS, INDIVIDUALLY, AND KATHERINE SAUNDERS WILLIAMS, EXECUTRIX OF THE ESTATE OF ELIZABETH GEORGE SAUNDERS, DECEASED Plaintiffs, v. FEDERAL LAND BANK OF JACKSON, FEDERAL LAND BANK ASSOCIATION OF JACKSON, - and - FARM CREDIT SYSTEM ASSISTANCE BOARD, AS SUCCESSOR IN INTEREST TO THE FARM CREDIT SYSTEM CAPITAL CORPORATION, Defendants.	Civil Action No. 88-0888 (BDP)

FIRST AMENDED COMPLAINT

COMES NOW the plaintiffs and file this their first amended complaint against the defendants and in support thereof would show unto the court as follow, to-wit:

I. Procedural History

1. This matter was originally filed on December 22, 1987 in the Circuit Court of Leflore County, Mississippi where it was docketed as Civil Action No. 12,111.

2. On March 31, 1988, the Farm Credit System Assistance Board, as successor in interest to the Farm Credit System Capital Corporation (hereinafter referred simply "Assistance Board"), removed the matter to this court. The Assistance Board alleged that removal was provided for under § 6.3(b) of the *Agricultural Credit Act of 1987*, P.L. 100-233, 101 Stat. 1568 (Jan. 6, 1988) (hereinafter referred to simply as the "1987 Act"), now codified as 12 USC § 2278a-3(b).

3. On motion of the Assistance Board, this court on July 13, 1988 entered an order dismissing the plaintiffs' complaint as against the Assistance Board without prejudice and with leave to file an amended complaint no later than September 12, 1988.

II. The Parties

4. The plaintiff is an adult resident citizen of the First Judicial District of Carroll County, Mississippi. Her mailing address is P. O. Box 160, North Carrollton, Mississippi 38947.

5. The defendant, Federal Land Bank of Jackson (hereinafter referred to as "FLB") is the federally chartered Bank for the Fifth Farm Credit District of the Farm Credit System. It is organized and exists pursuant to the Farm Credit Act of 1971, Pub. L. 92-181, as amended

(hereinafter referred to as the "1971 Act"). It is a cooperative bank which is owned by the Federal Land Bank Associations within the District. The Farm Credit Administration (hereinafter referred to as "FCA") declared the Federal Land Bank of Jackson insolvent and on May 29, 1988 the FCA placed the bank in receivership. REW Enterprises, Inc. was appointed receiver pursuant to 12 USC § 2183(b) and 12 CFR § 611.1155, et seq.. The process and papers of this court may be served upon this defendant by service upon the receiver at P.O. Box 16669, Jackson, Mississippi 39236-0669 or by personal service at 1800 East County Line Road, Ridgeland, Mississippi.

6. Effective July 1, 1986, the stockholders of the Federal Land Bank Associations of the Fifth District approved a proposal to merge all 32 Federal Land Bank Associations. The Associations were merged into an existing land bank association, accounted for as a pooling of interest, and the name was formally changed to the Federal Land Bank Association of Jackson (hereinafter referred to as "FLBA"). The FLBA is the successor in interest to the Federal Land Bank Association of Greenwood. On May 20, 1988, the Farm Credit Administration declared the Federal Land Bank Association of Jackson insolvent and placed it in receivership and appointed REW Enterprises, Inc. as receiver pursuant to 12 USC § 2183(b) and 12 CFR § 611.1155, et seq. This defendant may be served with the process and papers of this court by service upon the receiver at P.O. Box 16669, Jackson, Mississippi 39236-0669 or by personal service at 118 East County Line Road, Ridgeland, Mississippi.

7. The defendant, Assistance Board, is a federally chartered instrumentality established pursuant to the

1987 Act. New § 6.0 of the 1987 Act (12 USC § 2278a) required the dissolution of the Farm Credit System Capital Corporation (hereinafter referred to simply as "Capital Corporation"), a defendant originally named in this suit, and directs the chartering of the Assistance Board. On January 21, 1988, the Farm Credit Administration took the required action. New § 6.9(a) of the 1987 Act (12 USC § 2278a-9) requires that the Assistance Board succeed to the assets and all debts, obligations, contracts, and other liabilities of the Capital Corporation. On the basis of this section, the Assistance Board has been substituted for the Capital Corporation as a defendant in this suit. The Assistance Corporation may be served with the process and papers of this court at 1301 Pennsylvania Avenue, N.W., Suite 702, Washington, D. C. 20004.

III. Jurisdiction and Venue

8. Jurisdiction exists in this Court by virtue of 12 USC § 2012(4), 12 USC § 2033(4), 12 USC § 2258, 28 USC § 2680(n), and 7 CFR § 611.1142(b). This court has asserted removal jurisdiction by virtue by § 6.3(b) of the *Agricultural Credit Act of 1987*, P.L. 100-233, 101 Stat. 1568 (Jan. 6, 1988), codified as 12 USC § 2278a-3(b), and 28 USC § 1441(a).

IV. Statement of Facts – The Farm Credit System

9. The Farm Credit System ("FCS") had its inception in the 1916 Federal Farm Act. It currently operates under the Farm Credit Act of 1971, Pub. L. 92-181, as amended. The FCS was established to provide a stable

source of capital for agricultural producers. At its inception, it was capitalized by the Federal Government. By the mid-1960's all government capital had been repaid and the system was completely member-owned. The FCS is organized on three levels. At the top or national level is the Farm Credit Administration ("FCA"), an independent federal agency. At the intermediate level are the district banks which serve the local associations located in a specific geographic area. At the bottom level are borrower-owned associations which, subject to the financial and administrative supervision of the district banks, originate and service loans.

10. Under the provisions of the Farm Credit Act of 1971, the FLB's and the FLBA's are each given broadly defined corporate powers. In reality, however, the relationship is one of total domination of the FLBA's by the FLB's. While the FLBA's receive applications for loans, elect loan applicants to association membership, endorse loans to the FLB's and service loans for the FLB's, the FLB has the absolute authority and duty to supervise all aspects of the operations of the associations through the use of regulations, policy statements and guidelines. All lending policies are established by the FLB's and the banks supervise all credit administration practices of the associations.

11. When a farmer applies to a FLBA for a loan, the applicant becomes a member of the association and is required to subscribe to association stock in an amount between 5% or 10% of the face amount of the loan. The association then purchases a similar amount of stock in the FLB, which if it approves the loan application, provides capital for the loan.

12. Because of world economic conditions, the FCS has been destabilized. As of June 20, 1987, it was holding 6.47 billion dollars in loans for which neither principal nor interest payments were expected. It reported losses in 1985 of 2.7 billion, losses in 1986 of 1.9 billion and losses in 1987 through June 30th of 201 million. As of June 20, 1987, it projected total losses for 1987 in the amount of 1.28 billion dollars. As of that date, it remained solvent on paper only because Congress allowed it in 1986 to adopt the fiscally unsound "non-GAAP" (Generally Accepted Accounting Principle) of turning it [sic] losses into assets and writing them off over twenty years.

13. As a means to deal with these problems, the Capitol Corporation was created by Congress. Its duties were as follows:

(1) Carry out a program of financial assistance among institutions of the Farm Credit System;

(2) Acquire from other Farm Credit System institutions and participate with such institutions in non-performing assets of such institutions;

(3) Purchase, hold, restructure, collect, and otherwise administer and manage non-performing assets acquired from or participated in with other Farm Credit System institutions, and guarantee performing and non-performing assets held by other Farm Credit institutions;

(4) Provide technical assistance and related services to other Farm Credit System institutions in connection with the administration of their loan portfolios;

(5) Provide assistance and related services to Farm Credit System institutions to assist them in restructuring or refinancing loans of their member-borrowers; and,

(6) Receive and administer financial assistance for Farm Credit System institutions that originates outside of the Farm Credit System.

14. As an institution receiving assistance from the Capital Corporation, the Jackson Federal Land Bank was, in the Assistance Agreement which it executed with the Capital Corporation, required to delegate its authority to the Capital Corporation to manage the bank's loans which were in a non-accrual status.

V. Statement of Facts – The Plaintiff's Loan

15. The plaintiff has since the mid-1950's engaged in farming in Leflore and Carroll County, Mississippi. She has been a customer of the FLB and FLBA since the early 1950's. Until approximately 1985, she had never been late with a payment to the FLB. Although late, she made her payments to the FLB up into 1986. In 1986, she began experiencing a cash flow problem. At all times material to this litigation, the plaintiffs, among other things, owned the following assets:

(a) A 1451 acre tract of land in Leflore County, Mississippi known as "Cotesworth Farm – Runnymede Unit";

(b) A 320 acre tract of land in Leflore County, Mississippi adjacent to Highway 82 just west of the City

of Greenwood identified for the purposes of this litigation as the "Highway 82 tract;"

(c) An 800 acre tract of land in Carroll County, Mississippi known as the "Cotesworth Farm;"

(d) Farming equipment valued at $320,000;

(e) A herd of cattle valued at $225,000; and,

(f) Stock in the Bank of Commerce of Greenwood, Mississippi worth $105,000.

16. On or about March 17, 1987, plaintiff owed PCA[1] in principal, interest, and accrued penalties the approximate amount of $849,558.51. This was secured by a first deed of trust on approximately 771 acres of the land in Leflore County (described in paragraph 15 above) with a fair market value at that time of approximately $1,000.00 per acre or a total of $771,000.00. The remaining $78,558.51 was secured by a first lien on the farming equipment described in paragraph 15 above.

17. On or about March 17, 1987, plaintiff owed FLBA in principal, interest, and accrued penalties the approximate amount of $1,236,016.50. This was secured by a first deed of trust on approximately 1,000 acres of land in Leflore County (described in paragraph 15 above) with a fair market value at that time of $1,000.00 per acre

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[1] Production Credit Associations are the functional equivalent of FLBA's. PCA's are the arm of the Farm Credit System charged with the function of financing crop production. All PCA's in this farm credit district have been merged into the First South Production Credit Association.

or $1,000,000.00. The remaining $236,016.50 was secured by a second lien on the farming equipment.

18. On or about March 17, 1987, plaintiffs offered the defendants the following: Duncan Williams would purchase the 1451 acre tract of land known as Runnymede for $999.31 per acre or a total of $1,450,000.00 cash. In addition plaintiff proposed to pay over $112,591.91 in 1986 crop deficiency payments paid to her that same month and to surrender her PCA Stock valued at $100,800. This total amount of $1,663,391.91 was to have been used to pay PCA in full and pay the debt owed to FLB down to $422,183.10.

19. The remaining balance of $422,183.10 owed to FLB would have remained fully secured by a first lien on assets valued at $1,035,450.00. These assets included: The Highway 82 tract in Leflore County valued at $320,000.00; the farming equipment valued at $320,000.00; Federal Land Bank stock valued at $65,450.00; the cattle herd valued at $225,000; and, the Bank of Commerce stock worth $105,000. The plaintiffs offered this security to secure an eight month promissory note with the entire balance payable in full at the end of eight months.

20. Even though FLBA, FLB of Jackson and Capital Corporation were required by federal regulations, 12 CFR § 614.4510 (d)(1), and local regulations contained in the Partial Release of Security Policy set out in the Fifth Farm Credit District FLBA's Credit & Operations manual, as well as by regulations of the Jackson Special Assets Group ("SAG") to partially release the collateral as requested by plaintiffs, this offer was refused by FLB,

FLBA and the Capital Corporation, the latter acting as the alter ego of both FLBA and FLB.

21. The reason given for the refusal of this offer was that the land was worth more than $1,450,000.00. Since the defendants would have been fully secured by the remaining collateral offered for an eight month loan, this was not a valid reason to refuse the partial release. This decision was, therefore, arbitrary, capricious and made in bad faith.

22. Because of the unlawful economic duress placed on plaintiffs by the defendants, they made a subsequent offer on our [sic] about April 14, 1987 as follows: (1) Jimmy Henderson would purchase 1771 acres in Leflore County, Mississippi (both Runnymede and the Highway 82 tract) for $903.44 per acre or $1,600,000.00 of which approximately $1,575,000.00 would have gone to FLB/PCA reflecting payment of normal loan closing costs; (2) plaintiffs would pay PCA the 1986 government payments in the amount of $112,591.91; (3) Plaintiff would pay an additional $100,000 cash; (4) The Federal Land Bank stock valued at $65,450.00 would be surrendered; and, (5) The PCA stock valued at $100,800.00 would be surrendered. Thus, this offer totalled $1,953,841.91 or 94% of all amounts due as of March 20, 1987.

23. Although plaintiffs asked the defendants on numerous occasions to respond to this offer, they refused to do so and continued to do so through June 20, 1987. On that date the offer was accepted and the sale ultimately closed on July 17, 1987.

VI. Plaintiffs' Damages

24. The defendants' refusal to accept the Duncan Williams offer and their unwarranted delay in accepting the Jimmy Henderson offer caused the plaintiffs unnecessarily to pay PCA per diem at the rate of $232.90 for a period of 122 days from March 17, 1987 through July 17, 1987 or a total of $28,413.80.

25. The defendants' refusal to accept the Duncan Williams offer and their unwarranted delay in accepting the Jimmy Henderson offer caused the plaintiffs unnecessarily to pay FLB per diem at the rate of $415.11 for a period of 122 days from March 17, 1987 through July 17, 1987 or a total of $50,643.42.

26. The Duncan Williams offer amounted to $999.31 per acre for the 1451 acre tract. The Jimmy Henderson offer amounted to $903.44 per acre. Thus, as a result of the defendants' unwarranted refusal to accept the Duncan Williams' offer, the plaintiffs lost $95.87 per acre on 1451 acres or a total of $139,107.37.

27. Subsequent to the defendants' wrongful refusal of the Duncan Williams offer on March 17, 1987, Elizabeth George Saunders passed away on April 12, 1987. A dispute arose in the administration of the estate and in order to settle this dispute the plaintiff, Katherine Saunders Williams, was required to pay $110,000.00 to liquidate the claims of various putative heirs. If the defendants had accepted the offer made by Duncan Williams, this estate dispute would not have arisen.

28. The plaintiffs did not want to farm Runnymede in 1987. However, after the defendants wrongfully

refused on March 17th to accept the Duncan Williams offer, the plaintiffs were forced to farm this land. They were required to farm it because, among other reasons: (1) they needed the income; (2) they could not let their farming equipment and employees sit idle; and, (3) if Runnymede had not been farmed, all ASCS government program payments amounting to $238,000.00 per annum would have been lost. Because of the wrongful conduct of the defendants, the only lender the plaintiffs could find to finance their 1987 crop production was the Grenada Bank. Because of the problems created by the defendants, Grenada Bank would agree to finance production only on 50% of plaintiffs' Runnymede acreage. As a direct and proximate result of the defendants' wrongdoing, the plaintiffs were forced to idle 50% of their cotton acreage on Runnymede. This resulted in a net loss in 1987 cotton profits of $175,672.17.

29. As a direct and proximate result of the defendants' conduct, the plaintiff, Katherine Saunders Williams, has suffered severe emotional distress which has manifested itself in diminished familial relations, neglect of business and family responsibilities, as well as various other psychological and physical problems.

30. As a direct and proximate result of the wrongful conduct of the defendants, the plaintiffs have suffered the following injuries and damages for which they should be compensated, to-wit:

PCA per diem –	$ 28,413.80	
FLB per diem –	50,643.42	
Loss on sale of land –	139,107.37	
Settlement of estate dispute –	110,000.00	
Lost profits on 1987 cotton corp –	175,672.17	
Emotional distress –	500,000.00	
TOTAL – ALL DAMAGES		$1,003,836.76

VII. The Capital Corporation, FLB of Jackson, And FLBA As Alter Egos Of One Another

31. On September 30, 1986, the FLB of Jackson and the Capital Corporation entered into an *Assistance and Stock Purchase Agreement*, (hereinafter referred to as the "Assistance Agreement"). Under this Agreement, the Capital Corporation was granted the absolute authority to dominate the activities of the Federal Land Bank of Jackson and through it the FLBA.

32. As a part of the Assistance Agreement (§3.1(a)), the FLB of Jackson was required to and, in fact, passed and adopted corporate resolutions which in the event of any default whatsoever by the Federal Land Bank of Jackson in its obligations under the Assistance Agreement, gave the Capital Corporation:

(1) The right to have the Farm Credit Administration appoint the Capital Corporation as conservator for the Jackson Federal Land Band [sic];

(2) The right to select another Farm Credit System institution with which the Federal Land Bank of Jackson would consolidate or merge, including the exclusive right to determine the terms of the consolidation or

merger and to, submit the issue directly to the stockholders of the Jackson Federal Land Bank;

(3) The right to have substantially all of the Bank's assets sold upon terms and conditions to be determined solely by the Capital Corporation, to another Farm Credit System institution to be chosen by the Capital Corporation;

(4) The right to direct the management of all non-accrual assets, including the right to utilize employees who would be retained as employees of the Jackson FLB to manage such loans and assets, and the right to reimbursement of the Capital Corporation for expenses incurred by it in connection with such management.

(5) Assignment to the Capital Corporation of the income from all mineral interests of the Jackson FLB and the granting of an option to the Capital Corporation to acquire such mineral interests at fair market value.

33. In the Assistance Agreement (section 2.1), the Capital Corporation agreed to subscribe through March 31, 1989 (the "subscription" period) to purchase such number of shares of FLB preferred stock at $100,000.00 per share as necessary to provide the bank with enough capital to allow it to remain solvent and prevent impairment of its capital stock. The Jackson FLB in return agreed to to [sic] redeem the stock no later than March 31, 2009 (the "redemption" period) at a purchase price equal to the price paid by the Capital Corporation (section 2.2).

34. Also, pursuant to the Assistance Agreement, the FLB of Jackson passed and adopted resolutions stating

that during the subscription and redemption periods, that is to say through March 31, 2009, the Capital Corporation would have the following additional rights:

(1) The right (section 3.1(a)(i)(7)) to approve or disapprove any change in senior FLB officers;

(2) The right (section 3.1(a)(i)(8)) to require that all directors and senior officers currently in office and any replacements, elected or appointed, execute and deliver to the Capital Corporation an undated signed resignation to be used by the Capital Corporation in the case of default by the FLB or if it should, in its absolute discretion, decide that the director or senior officer had:

a. failed to maintain any obligation or loan to the Jackson FLB in a "quality" status;

b. breached his duty of loyalty to the Jackson FLB;

c. breached his duty of "care" to the Jackson FLB; or,

d. breached *any* term, condition, or covenant of the Assistance and Stock Purchase Agreement; or,

e. interfered with the "safe and sound management" of the Jackson FLB.

(3) The right to require that each director whose resignation is accepted agree not to seek re-election to the board of directors.

35. The Assistance Agreement (section 3.1(j)) also required the Jackson FLB to design and adopt programs *acceptable to the Capital Corporation* to achieve the following:

(1) Adjustment of individual loan limits for FLBA approval and adjustment of control by the Jackson FLB of loan risk exposure;

(2) Sound credit standards, including standards that would ensure a high credit quality for director loans;

(3) A comprehensive credit review program for the Jackson FLB;

(4) A lending philosophy which permits the extension of credit only to credit-worthy borrowers;

(5) The restructuring of loans of the Jackson FLB to achieve the repayment of the restructured loans in accordance with the Farm Credit System restructuring policy;

(6) The assignment of the appropriate personnel to be responsible for the organization and direction of the Jackson FLB's efforts to alleviate credit problems in the Fifth Farm Credit District; and,

(7) Plans to reduce the operating costs of the Jackson FLB and the FLBA, as consistent with sound business practices.

36. The Assistance Agreement (section 3.1(k)) also required the Jackson FLB to within 90 days, or no later than December 30, 1986, enter into a Servicing Agreement with the FLBA, in form and content *satisfactory to the Capital Corporation*, which would:

(1) Define the relationship between the Jackson FLB and the FLBA;

(2) Establish sufficient authority of the Jackson FLB over the FLBA to ensure competent management of

FLBA and performance of duties by FLBA officers and employees in a manner consistent with the duties, obligations and responsibilities of an officer of a financial institution or pursuant to the terms of the Assistance and Stock Purchase Agreement, itself.

37. The Assistance and Stock Purchase Agreement between the Capital Corporation and the FLB of Jackson also provided that the Servicing Agreement between the FLB of Jackson and the FLBA could not be amended or terminated without the prior written approval of the Capital Corporation.

38. The Assistance Agreement (section 3.1(k)(1)) also required the assignment by the bank to the Capital Corporation of all claims of $50,000.00 or more against persons alleging acts or omissions resulting in the threat of or actual capital impairment of the FLB or FLBA or alleging misuse or misapplication of the proceeds of the purchase of preferred stock or other assistance provided by the Capital Corporation. It was agreed that any funds recovered as a result of the pursuit of such claims, exclusive of expenses, including legal fees, would be credited to the Jackson FLB as payment to the Capital Corporation for the redemption of preferred stock.

39. In Section 5 of the Assistance Agreement, the Jackson FLB agreed that so long as the Capital Corporation had not been repaid in full for its purchase of preferred stock:

(1) The Jackson FLB would not incur future liabilities or increase the amount of its then present indebtedness, unless done in accordance with the financial plan to have been adopted by the Jackson FLB on or

about December 1, 1986 and approved by the Capital Corporation;

(2) No debt offering or sale outside the financial plan by the Jackson FLB would be made without the prior written approval of the Capital Corporation;

(3) Any proposed changes in the interest rate policies would be subject to approval by the Capital Corporation;

(4) Unless otherwise agreed in writing by the Capital Corporation any earnings of the bank accrued during the term of the agreement were to be placed in a surplus account and no dividends paid, except on the Capital Corporation's preferred stock, without the prior written approval of the Capital Corporation;

(5) The Jackson FLB would "exercise its authority in a manner calculated to cause the FLBA to conduct their delegated lending authority according to standards adopted by the Jackson FLB and approved by the Capital Corporation";

(6) The Jackson FLB would, as instructed by the Capital Corporation, take action in its supervisory capacity over the FLBA to cause the FLBA to have in place and in operation within 90 days (that is no later than December 30, 1986), a loan classification program, the standards and scope of which would meet FCA regulations and which would be subject to approval by the Capital Corporation;

(7) The Jackson FLB would conduct a comprehensive review of the FLB, as soon as practicable, the

standards and scope of which would be submitted for prior approval of the Capital Corporation;

(8) The Jackson FLB would, as instructed by the Capital Corporation, require that all future loan documents entered into after the date of the Assistance Agreement (September 30, 1986) would provide that borrower payments would be applied first to interest, except for such loans as were in a non-accrual status, and, as to those loans, that interest would continue to accrue;

(9) The Jackson FLB would continue to implement all programs and structural changes which were mandated and approved by the Capital Corporation as conditions precedent to the Assistance Agreement and it would continue to comply with, and enforce the FLBA's compliance with, the Servicing Agreement with the FLBA as described in and required by section 3.1(k) of the Assistance Agreement;

(10) The Jackson FLB would cause the FLBA to keep true books of records and accounts in which full and correct entries were to made of all its business transactions;

(11) The Jackson FLB would pay all taxes, assessments and governmental charges or levies imposed upon its property and maintain its property in good condition and make all necessary renewals, repairs, replacements, additions, betterments, and improvements provided, however, that such expenditures for property maintenance would not exceed the anticipated expenditures for property maintenance set forth in the bank's financial plan described in and required by section 5.1 of

the Assistance Agreement without the prior written approval of the Capital Corporation;

(12) The Jackson FLB would not violate and it would take such action necessary to prevent the FLBA from violating any law, ordinance, or governmental rule or regulation to which they were subject and that they would obtain all licenses, permits, franchises, or other governmental authorizations necessary to the ownership of their property or to the conduct of their business;

(13) The Jackson FLB would not sell, lease, transfer, or otherwise dispose of any of its assets other than in the ordinary course of business without the prior written consent of the Capital Corporation;

(14) The Jackson FLB, except with the prior written consent of the Capital Corporation, would not cause or permit its property to be subjected to a lien other than in the case of systemwide FCS obligations;

(15) The Jackson FLB would not engage in any line of business or financially related services substantially different from the banking business it was then engaged in without the prior written consent of the Capital Corporation;

(16) The Jackson FLB would not, directly or indirectly, guarantee or become liable for any equity or capital investment in any entity other than the FLBA without the prior written consent of the Capital Corporation;

(17) The Jackson FLB would give immediate notice to the Capital Corporation of any claim or litigation of $50,000.00 or more against the Jackson FLB, its

officers, directors, or employees or any of the FLBA's or their respective successors. It was further agreed that if the Capital Corporation determined that any such litigation was material to the ability of the Jackson FLB to redeem the Capital Corporation's stock or to meet its other obligations, the Capital Corporation would have the right to direct the defense or prosecution of the litigation. The Jackson FLB also agreed to supply monthly status reports to the Capital Corporation with respect to such material litigation and to take all action reasonably requested by the Capital Corporation in a timely fashion in connection with the prosecution or defense of such litigation, including, the selection of counsel acceptable to the Capital Corporation. It was further agreed that settlement of all material litigation was subject to approval in advance by the Capital Corporation. With regard to all other litigation not considered material litigation, the FLB of Jackson agreed to submit quarterly reports to the Capital Corporation which had right to treat such litigation as material litigation;

(18) The Jackson FLB would not, without the prior written consent of the Capital Corporation, create or acquire any interest in any service corporation;

(19) The Jackson FLB would not become or be a party to any contract or agreement which would impair its ability to perform under the Assistance and Stock Purchase Agreement and/or any related agreements or documents;

(20) The Jackson FLB would use the proceeds from the sale of the preferred stock to the Capital Corporation solely for the purpose of preventing the

impairment of its capital stock and for such other purposes as might be approved by the Capital Corporation.

40. In §5.17 of the Assistance and Stock Purchase Agreement, the Jackson FLB agreed to provide to the Capital Corporation at the expense of the bank, office space and necessary supplies and equipment required by an on-site team to perform the responsibilities assigned to that team by the Capital Corporation. The bank further agreed to grant to the Capital Corporation and it representatives and employees full and complete access to any books, or records, papers, loan files, documents, and personnel of the Jackson FLB which the Capital Corporation or any of its representatives or employees might in their *sole discretion* identify or request. The Jackson FLB further agreed to provide reasonable notice to the Capital Corporation of the time, place and purpose of any significant or regularly scheduled meetings of the Jackson FLB or the FLBA, involving employees, officers, directors, or stockholders and agreed to permit representatives of the Capital Corporation, at their discretion, to attend any such meetings.

41. The Jackson FLB agreed in §5.18 of the Assistance and Stock Purchase Agreement to prepare and implement and to use its best efforts to cause the FBLA to prepare and implement a long term plan *acceptable to the Capital Corporation* dealing with the financial difficulties of the Jackson FLB and the FLBA. The Agreement required that this plan was to have been implemented, in a manner *acceptable to the Capital Corporation*, by December 31, 1986.

42. The Jackson FLB agreed in §5.19 of the Assistance and Stock Purchase Agreement that so long as the Agreement remained in effect it would furnish the following reports to the Capital Corporation:

(1) A quarterly balance sheet as of the last day of each quarter and an income statement for each quarter, all in reasonable detail and reviewed by independent public accountants and certified by the chief financial officer of the bank;

(2) Within 90 days after the end of each fiscal year, an annual financial statement which had been audited by an independent public accountant;

(3) Copies of all financial reports submitted to the Jackson FLB by its independent public accountants that were not specifically required to be delivered to the Capital Corporation pursuant to any other provision of the Assistance Agreement;

(4) Concurrent with submission, copies of all reports sent by the Jackson FLB to any governmental agency and all reports provided to the board of directors of the Jackson FLB;

(5) As soon as available to the Jackson FLB, the quarterly balance sheet and income statement of the FLBA; and,

(6) Such other data, information and reports as the Capital Corporation might request.

In section 5.21 of the Assistance and Stock Purchase Agreement,the Jackson FLB agreed that so long as the Assistance Agreement remained in effect, the Jackson FLB would maintain its financial books, accounts, and records

and would supervise the maintenance by the FLBA of its financial books, accounts, and records in accordance with the Farm Credit System Uniform Chart and Description of Accounts and would permit the Capital Corporation and the on-site team to examine all books and records and discuss the financial affairs of the Jackson FLB and that of the FLBA with the principal officers of the Jackson FLB.

44. In §5.22 of the Assistance and Stock Purchase Agreement, the Jackson FLB agreed that it would not merge or consolidate with any other institution without the prior written consent of the Capital Corporation, so long as the original purchase price of the shares of preferred stock held by the Capital Corporation was equal to or in excess of 40% of the par value of the Jackson FLB's capital stock. If it were less than 40%, the Jackson FLB would have been allowed to consolidate or merge with another institution without the Capital Corporation's consent but only so long as the successor expressly assumed all obligations and agreed to be bound by the terms and conditions of the Assistance and Stock Purchase Agreement.

45. In §5.23 of the Assistance Agreement, the Jackson FLB agreed that no senior officer of the bank would be discharged and no replacement of a senior officer designated, without the prior written consent of the Capital Corporation.

46. In §5.24 of the Assistance Agreement, the Jackson FLB agreed that it would not revoke or rescind any of the resolutions required as conditions precedent to the

Assistance Agreement without the prior written consent of the Capital Corporation.

47. In §5.25 of the Assistance Agreement, the Jackson FLB agreed that it would not issue any shares of preferred stock to any party other than the Capital Corporation without the prior written approval of the Capital Corporation.

48. In §6.1 of the Assistance Agreement a "default" was defined as, among other things:

(1) Default on the part of the Jackson FLB in the observance or the performance of *any* covenant, obligation, term or condition of the Assistance Agreement or in any document executed in connection with the Assistance Agreement; or,

(2) Any material adverse change in the financial condition or prospects of the Jackson FLB which, in the opinion of the Capital Corporation, renders the subscription for additional shares imprudent.

49. As set out in §6.3 of the Assistance Agreement, in the case of a default not cured within 10 days of written notice, the Capital Corporation had, among its other remedies and in addition to all remedies provided by law, the:

(1) Right to demand immediate redemption of all outstanding preferred stock at the purchase price by the Capital Corporation; and,

(2) The right to make application to the Farm Credit Administration for appointment of a conservator for the Jackson FLB.

50. In conjunction with the Assistance and Stock Purchase Agreement, the Capital Corporation and the Jackson FLB entered into an *Asset Servicing Agreement* on November 11, 1986. The purpose of this Agreement was to set forth their Agreement with respect to the Capital Corporation's management of the Jackson's FLB's "non-accrual assets" which were called "account 215 assets."

51. Pursuant to the *Asset Servicing Agreement*, the parties, among other things, agreed as follows:

(1) The Jackson FLB would develop policies and guidelines, in form and content satisfactory to the Capital Corporation, for the management of the Jackson's FLB's non-accrual assets;

(2) A separate team of employees would be established to handle non-accrual loans. The bank was required to assign bank employees to the team and to other duties connected with the management of the non-accrual assets and hire such new employees necessary to staff the team or perform such duties. However, all staffing and employment decisions were subject to approval by the Capital Corporation. All such employees were to remain or become employees of the Jackson FLB;

(3) The Jackson FLB, prior to the initial subscription by the Capital Corporation for preferred stock, would manage the non-accrual assets under the oversight of the Capital Corporation and pursuant to the policies and guidelines developed by the Jackson FLB and approved by the Capital Corporation. It was agreed that before the Jackson FLB would deviate from these policies and guidelines, it would first consult with the Capital Corporation;

(4) After the initial subscription and purchase of preferred stock it was agreed that the non-accrual assets would be managed by the Capital Corporation. The Capital Corporation would utilize the team and other employees previously assigned duties related to the non-accrual assets, or such other employees as the Capital Corporation deemed necessary or desirable. It was agreed that such employees would be retained as employees of the Jackson FLB unless otherwise designated by the Capital Corporation as a Capital Corporation employee. The parties agreed that if there was a disagreement between the Jackson FLB and the Capital Corporation as to whether the Capital Corporation should deviate from bank policies and guidelines in the management of non-accrual assets, the parties would attempt to resolve their dispute but "in the event that such officers fail to reach agreement, the decision of the Capital Corporation shall prevail".

52. In this case the Capital Corporation, a federally chartered instrumentality, ("dominant" corporation) totally dominated the FLB and FLBA ("subservient" corporations). Therefore, the corporate veil should be pierced and the Capital Corporation as the dominant entity held liable as the alter ego of the subservient entities, FLB and FLBA. Likewise, the FLB totally dominated the FLBA and it should be held liable as the alter ego of the FLBA.

VIII. The Status of the FLB and FLBA As Cooperatives

53. Congress declared in the law establishing the Farm Credit System that it is a "farmer-owned cooperative Farm Credit System." 12 USC §2001(a). The Jackson

FLB and FLBA as cooperatives, have the following characteristics:

(1) Their basic purpose is to render economic benefits to their members;

(2) They are organized around the mutual interests of their members;

(3) Risks, costs, and benefits are shared equitably among their members;

(4) They are non-profit enterprises in the sense that they are organized for the economic benefit of their members as users of their services and not to make profits for the cooperative as a legal entity or for their members as investors;

(5) They are set up to be democratically controlled; and,

(6) They do business exclusively with their members.

IX. PLAINTIFFS' CAUSES OF ACTION

A. First Cause Of Action – Breach Of The Cooperatives' Duties

54. As a cooperative, one duty owed plaintiffs by the FLB of Jackson and the FLBA is the duty to treat them fairly. The Jackson FLB and FLBA also owe the plaintiffs the duty to exercise that degree of care which an ordinarily prudent man would exercise under the same or similar circumstances.

55. Because acceptance of the Duncan Williams' offer would have left the FLB and FLBA more than fully secured, there was no legitimate or sound business reason for the defendants to turn this offer down. Therefore, the decision to turn the Duncan Williams' offer down was arbitrary and capricious. Thus, when the defendants turned down the Duncan Williams' offer, they breached both the duty to treat the plaintiffs fairly and also the duty to exercise that degree of care which an ordinarily prudent man would have exercised under the same or similar circumstances. The breach of these duties proximately resulted in damage to the plaintiffs as set out hereinabove more specifically in paragraphs 24-30. The FLBA and FLB of Jackson are both liable for this conduct as principals. The Capital Corporation is also liable for this conduct as the alter ego of both the FLBA and the FLB of Jackson.

B. Second Cause Of Action – Breach of Contract

56. One of the documents forming the contract between the parties is the land deed of trust given by the plaintiffs as grantors or settlers to the FLB of Jackson (formerly Federal Land Bank of New Orleans), as beneficiary and dated March 16, 1981. Paragraph 10 of the deed of trust states: "This instrument and the note secured hereby are subject to the Farm Credit Act of 1971 and all acts mandatory thereof or supplementary thereto, and the laws of the state of Mississippi not inconsistent therewith." Paragraph 12 of this deed of trust states: "That each covenant and agreement herein contained shall inure to the benefit of and bind the successors and

assigns of beneficiary and grantor." These provisions of the contract are consistent with the rule of law that where the subject matter of a contract lies in an area covered by federal law, the parties necessarily adopt, as a part of their agreement, the applicable provisions of the federal law.

57. The parties necessarily then adopted as a part of the contract between them 12 CFR §6.14.4510(d)(1) which required the FLB of Jackson and the FLBA to adopt loans servicing policies and procedures providing that all loans, including the plaintiffs, would be serviced fairly and equitably in a prompt and efficient manner including the partial release of security. The parties also necessarily then adopted as a part of their agreement the policy on partial release of security contained in the Fifth Farm Credit District Federal Land Bank Association's Credit and Operations Manual, as well as the policy on partial release of collateral set out in the Policy and Procedures Manual of the Special Assets Group of the Jackson FLB.

58. Acceptance of the Duncan Williams' offer would have left the FLB and FLBA more than fully secured. Therefore, when the defendants turned down the Duncan Williams' offer, they breached their contract with the plaintiffs which required that, under these circumstances, a partial release of collateral be granted. The breach of this provision of the contract proximately resulted in damage to the plaintiffs as set forth hereinabove more specifically in paragraphs 24-30. As a party to this contract, the Jackson FLB is liable for this breach. The Capital Corporation is also liable for this breach of contract as the alter ego of both the FLB of Jackson and the FLBA.

C. **Third Cause Of Action – Breach Of Implied Covenant Of Good Faith And Fair Dealing**

59. As a matter of law, there was implied in the contract between the plaintiffs and the FLB of Jackson and the FLBA an implied covenant of good faith and faith dealing.

60. The defendants had a lawful right to exercise their discretion in determining whether to partially release the plaintiffs' collateral. However, the covenant of good faith and fair dealing required the defendants, if they denied the plaintiffs' request to partially release the collateral, to base their decision on rational reasoning. Because acceptance of the Duncan Williams' offer would have left the FLB and FLBA more than fully secured, there was no legitimate or sound business reason for the defendants to turn this offer down. Therefore, the decision to turn the Duncan Williams' offer down was arbitrary and capricious and a breach of the covenant of good faith and fair dealing. The breach of this covenant proximately resulted in damage to the plaintiffs as set out hereinabove more specifically in paragraphs 24-30. As a party to the contract, the FLB of Jackson is liable for this breach of contract. The Capital Corporation is also liable for this breach of contract as the alter ego of both the FLB of Jackson and the FLBA.

D. **Fourth Cause Of Action – Tortious Breach Of Duty Of Good Faith And Fair Dealing**

61. Under the circumstances of this case, the law imposed upon the Federal Land Bank of Jackson, as a

lender, and the Capital Corporation as its alter ego, or for that matter, the Capital Corporation, as an independent contractor handling the financial affairs of the bank's customers, the duty to deal fairly and in good faith with the plaintiffs as customers of the FLB of Jackson.

62. Because acceptance of the Duncan Williams' offer would have left the FLB and FLBA more than fully secured, there was no legitimate or sound business reason for the Capital Corporation to have turned this offer down. Therefore, the decision of the Capital Corporation to turn the Duncan Williams' offer down was arbitrary and capricious. Thus, when the Capital Corporation turned down the Duncan Williams' offer, it breached the duty, imposed by law to deal with the plaintiffs in good faith and fairly. The breach of this duty proximately resulted in damage to the plaintiffs as set out hereinabove more specifically in paragraphs 24-30. The FLB of Jackson, the FLBA and the Capital Corporation are all liable for this breach of duty as joint tortfeasors. In addition, the Capital Corporation is liable for this breach of duty as the alter ego of the FLB of Jackson and the FLBA.

E. Fifth Cause Of Action – Negligent Delay In Closing The Sale To Jimmy Henderson

63. The law imposes upon a lending institution such as the FLB of Jackson, under the circumstances of this case, and the Capital Corporation as its alter ego, or for that matter the Capital Corporation as an independent contractor handling the financial affairs of the bank's customers, the duty to handle with due care and conclude

within a reasonable time the business transactions of the bank's customers.

64. This duty was breached when the Capital Corporation delayed until June 20, 1987 in accepting the plaintiffs' offer of April 14, 1987 to sell her land to Jimmy Henderson and in delaying from June 20, 1987 through July 17, 1987 in the closing of the sale to Jimmy Henderson. These breaches of duty both proximately resulted in damage to the plaintiffs as hereinabove more specifically set out in paragraphs 24-30. The FLB of Jackson is liable for these breaches because its duty in this regard to the plaintiffs was non-delegable. The Capital Corporation is liable for these breaches as a joint tortfeasor and also as the alter ego of the FLB of Jackson.

F. Sixth Cause Of Action – Intentional or Negligent Infliction Of Emotional Distress

65. The law imposes upon a person a duty to refrain from engaging in conduct towards other persons which evokes outrage. This rule is particularly applicable when the conduct can reasonably be foreseen to impinge on the solicitude and well-being of the person in his home and also his land, when the land furnishes his livelihood.

66. Under the circumstances of this case, this duty was breached when the Capital Corporation refused to partially release the plaintiffs' collateral and turned down the Duncan Williams' offer, when the Capital Corporation negligently delayed its acceptance of the Jimmy Henderson offer, and when the Capital Corporation negligently delayed the closing of the sale to Jimmy Henderson.

67. The breaches of this duty proximately caused the plaintiff, Katherine Saunders Williams, to suffer severe emotional distress which has manifested itself in diminished familial relations, neglect of business and family responsibilities, as well as various other psychological and physical problems. The Capital Corporation, alone, is responsible for these damages.

G. Seventh Cause Of Action – Intentional Interference With A Contract And Business Expectancy

68. Since it knew that the plaintiffs had a valuable business expectancy or contract with Duncan Williams and it also knew that the plaintiffs had a valuable business expectancy or contract with Jimmy Henderson and a valuable business expectancy in their farming operations, the law imposed upon the Capital Corporation a duty to refrain from engaging in wrongful conduct without legal or social justification that it was certain or substantially certain would result in interference with these contracts and valuable business expectancies. The conduct of the Capital Corporation in refusing to partially release the plaintiffs' collateral and turning down the Duncan Williams' offer, its delay in accepting the Jimmy Henderson offer, and its delay in closing the Jimmy Henderson sale were all wrongful acts or omissions without either legal or social justification which the Capital Corporation was certain or substantially certain would result in interference with the plaintiffs' valuable business expectancies and contracts. The breaches of this duty by the Capital

Corporation proximately resulted in damage to the plaintiffs as set out hereinabove more specifically in paragraphs 24-30. The Capital Corporation, alone, is responsible for this conduct.

H. Eight Cause Of Action – Unlawful Control

69. Under the circumstances of this case, the law imposed upon the FLB of Jackson, as a lender, and the Capital Corporation as its alter ego, or for that matter the Capital Corporation, as an independent contractor handling the financial affairs of the bank's customers, the duty to refrain from using its position to exert control over the plaintiffs' business affairs in any way so as to have influenced the plaintiffs into adopting a certain course of conduct which the plaintiffs otherwise would not have taken.

70. This duty was breached when the Capital Corporation refused to accept the Duncan Williams' offer on the ground that Katherine Williams was not obtaining a high enough price for her land and in its delay in accepting the Jimmy Henderson offer; which delay the plaintiffs allege upon information and belief was due to a desire on the part of the Capital Corporation to obtain a higher price for the land than that offered by Jimmy Henderson. So long as the FLB of Jackson remained fully secured, Katherine Williams had a right to manage her own affairs and set the sale price of her land without the unlawful interference of the Capital Corporation whose efforts to set the sale price of her land amounted to an attempt to unlawfully control her affairs. The breach of this duty proximately resulted in damage to the plaintiffs as set out

hereinabove more specifically in paragraphs 24-30. The Capital Corporation alone is responsible for this conduct as the tortfeasor guilty of having carried out this conduct and as the alter ego of the FLB of Jackson.

X Prayer For Relief

WHEREFORE, PREMISES CONSIDERED, plaintiff prays that this her complaint be received and filed and that after a trial by jury thereon, she be awarded a judgment against the defendants jointly and severally, in the amount of ONE MILLION, THREE THOUSAND, EIGHT HUNDRED THIRTY-SIX DOLLARS and 76/100 ($1,003,836.76) actual damages, plus all costs of court to be taxed against the defendants, attorneys' fees, and prejudgment and post judgment interest.

Respectfully submitted

KATHERINE SAUNDERS WILLIAMS

BY: /s/ Lee Abraham, Jr.
LEE ABRAHAM, JR.

BY: /s/ Preston Davis Rideout, Jr.
PRESTON DAVIS RIDEOUT, JR.

ABRAHAM & RIDEOUT
P.O. Box 8407
Greenwood, MS 38930
(601) 453-3000

BY: /s/ Ronald L. Drake
RONALD L. DRAKE,
ESQUIRE
D.C. Bar #338392
1350 New York Avenue, N.W.
Suite 700
Washington, D.C. 20005
(202) 682-0223

ATTORNEYS FOR PLAINTIFFS

JURY DEMAND

Plaintiff demands trial by jury.

BY: /s/ Ronald L. Drake
RONALD L. DRAKE

CERTIFICATE OF SERVICE

I, Ronald L. Drake, do hereby certify that I have served a true and correct copy of the above and foregoing First Amended Complaint, by mailing same, postage prepaid to the following:

Stephen J. Murphy, III, Esquire
United States Department of Justice
Civil Division
Federal Programs Branch
Post Office Box 883
Washington, D.C. 20044
Attorneys for Defendant Farm Credit
System Assistance Board

Kathleen Mullarkey, Esquire
Deputy General Counsel
Farm Credit System Assistance Board
1301 Pennsylvania Ave., N.W.
Suite 702
Washington, D.C. 20004
Attorney for Defendant Farm Credit
System Assistance Board

Lawrence E. Allison, Jr., Esquire
Brunini, Grantham, Grower & Hewes
1400 Trustmark Building
Jackson, MS 39201
Attorney for Federal Land Bank
of Jackson and
Attorney for Federal Land Bank
Association of Jackson

Richard B. Dagen, Esquire
Sidley & Austin
1722 Eye Street, N.W.
Washington, D.C. 20006
Attorneys for Federal Land Bank
and Federal Land Bank Association

Francis X. Markey, Esquire
Jones, Day, Reavis & Pogue
1450 G Street, N.W.
Washington, D.C. 20005-2088
Attorneys for Federal Land Bank
of Jackson and
Attorney for Federal Land Bank
Association

DATED, this the 12th day of Sept., 1988.

/s/ Ronald L. Drake
RONALD L. DRAKE

APPENDIX B

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued November 28, 1990 Decided February 4, 1992

No. 90-5064

KATHLEEN SAUNDERS WILLIAMS, INDIVIDUALLY, and KATHERINE SAUNDERS WILLIAMS, EXECUTRIX OF THE ESTATE OF ELIZABETH GEORGE SAUNDERS, DECEASED,

APPELLANT

V.

FEDERAL LAND BANK OF JACKSON, FEDERAL LAND BANK ASSOCIATION OF JACKSON, and FARM CREDIT SYSTEM ASSISTANCE BOARD,

APPELLEES

Appeal from the United States District Court for the District of Columbia

(Civil Action No. 88-00888 (BDP))

Presion Davis Rideout, Jr. for appellant. With him on the brief and supplemental brief was *A. Lee Abraham, Jr.* *Gina L. Bardwell* also entered an appearance for appellant.

Bills of cost must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Matthew M. Collette, Attorney, Department of Justice, for appellees. With him on the brief and supplemental brief for appellee Farm Credit System Assistance Board were *Jay B. Stephens,* United States Attorney, and *Anthony J. Steinmeyer,* Attorney, Department of Justice. *Stewart A. Block* was on the brief and supplemental brief for appellees Federal Land Bank of Jackson and Federal Land Bank Association of Jackson. *Richard B. Dagen* also entered an appearance for appellees Federal Land Bank of Jackson and Federal Land Bank Association of Jackson.

Before MIKVA,* *Chief Judge,* and WILLIAMS and THOMAS,** *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* WILLIAMS.

WILLIAMS, *Circuit Judge*: In 1981 Katherine Saunders Williams and her mother, Elizabeth George Saunders, used Runnymede Plantation, their 1400-acre farm in Leflore County, Mississippi, as security for a loan of $1,309,000. They borrowed this sum through the Federal Land Bank Association of Greenwood (predecessor in interest to defendant Federal Land Bank Association of Jackson), which serviced loans for the Federal Land Bank

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*Chief Judge Mikva did not participate in oral argument. The case was submitted to him on the briefs and on taped recordings.

**Former Circuit Judge Thomas, now an Associate Justice of the Supreme Court of the United States, was a member of the panel when the case was argued but did not participate in this opinion.

of New Orleans (predecessor in interest to defendant Federal Land Bank of Jackson).[1] Williams and Saunders farmed their land through boom times, then bust, and six years later they owed $1,236,016.50.

On March 17, 1987, Williams and Saunders told the Federal Land Bank Association of Jackson that they wanted to sell Runnymede Plantation to a Duncan Williams for $1,450,000, or about $999 an acre, and to use some of the proceeds to reduce their debt to $422,183.10. They proposed to secure the remaining debt with a lien on several other of their assets, including land worth, according to Williams and Saunders, $320,000. The Land Bank Association, on behalf of the Land Bank, and at the direction of the Farm Credit System Capital Corporation (according to William and Saunders), rejected the proposal.

Saunders died on April 12. On April 14 Williams told the Land Bank Association that she wanted to sell Runnymede and the highway tract together to a Jimmy Henderson for a total of $1,600,000, or about $903 an acre, and to use some of the proceeds to extinguish her debt. The Land Bank Association took the proposal under advisement. According to Williams, the Capital Corporation

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[1] By 1987, the year in which the events at issue occurred, the Federal Land Bank of Jackson had begun receiving financial help from the Farm Credit System Capital Corporation. See Farm Credit Amendments Act of 1985, Pub. L. No. 99-205, § 103, 99 Stat. 1678, 1680-87 (codified at 12 U.S.C. §§ 2216-2216k) (creating the Farm Credit System Capital Corporation to bail out financial institutions within the farm credit system), repealed by Agricultural Credit Act of 1987, Pub. L. No. 100-233, tit. II, § 207(a)(3), 101 Stat. 1568, 1607 (1988).

told the Land Bank Association to wait. On June 20 the Land Bank Association approved the offer on behalf of the Land Bank. The sale closed on July 17, and Williams paid off her debt in full.

On December 22, 1987, Williams brought this action in the Circuit Court of Leflore County, individually and as executrix of her mother's estate, against the Land Bank, the Land Bank Association, and the Capital Corporation, charging the defendants with various torts and breaches of contract arising from their response to the two offers. Williams asked for compensatory damages totaling $1,003,836.76. This included the $139,107.37 ($96 per acre) difference between the Duncan Williams and Jimmy Henderson bids, $175,672.17 for profits allegedly lost because the Capital Corporation's position created uncertainty which in turn blocked access to production financing, and $500,000 in damages for emotional distress.

On January 21, 1988, the Farm Credit System Assistance Board replaced the Capital Corporation as a defendant as a consequence of statutory changes,[2] and on April 1, the Assistance Board removed the case to the United States District Court for the District of Columbia. On May 20, the Farm Credit Administration, the independent

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[2] See Agricultural Credit Act of 1987, Pub. L. No. 100-233, tit. VI, § 6.0, 101 Stat. 1568, 1585 (1988) (codified at 12 U.S.C. § 2278a) (replacing the Capital Corporation with the Assistance Board); *id.* tit. VI, § 6.3(b), 101 Stat. at 1587 (codified at 12 U.S.C. § 2278a-3(b)) (giving the Assistance Board removal power); see also *id.* tit. IV, § 401, 101 Stat. at 1622 (merging Federal Land Banks and Federal Intermediate Credit Banks to form Farm Credit Banks).

agency atop the farm credit system, declared the Land Bank and the Land Bank Association insolvent and placed them in the hands of receivers. The defendants answered Williams's amended complaint and then moved to dismiss it for failure to state claims upon which relief could be granted. The district court granted the defendants' motion, *Williams v. Federal Land Bank*, 729 F. Supp. 1387 (D.D.C. 1990), and Williams appealed. We heard argument and then ordered supplemental briefing on certain jurisdictional questions. We begin with them.

* * *

The statute establishing the Assistance Board provides:

> Notwithstanding any other provision of law, any civil action . . . to which the Assistance Board is a party shall be deemed to arise under the laws of the United States, and the United States District Court for the District of Columbia shall have exclusive jurisdiction over such. The Assistance Board may . . . remove any such action . . . from a State court to the United States District Court for the District of Columbia.

12 U.S.C. § 2278a-3(b). Congress's clear intention – to create federal jurisdiction over all cases to which the Assistance Board is a party – prevails if the Constitution permits.

Article III, section 2 provides that the judicial power "shall extend to all Cases . . . arising under . . . the Laws of the United States." These include cases to which a federal instrumentality is a party, on the theory that the provision creating the entity is potentially at issue in every such case. See *Osborn v. Bank of the United States*, 22

U.S. (9 Wheat.) 738, 822-28 (1824). The Supreme Court has already found federal land banks and federal land bank associations to be federal instrumentalities. See *Knox Nat'l Farm Loan Ass'n v. Phillips*, 300 U.S. 194, 202 (1937) (federal land bank association, for purposes of susceptibility to state court winding-up procedures); *Federal Land Bank v. Priddy*, 295 U.S. 229, 231-32 (1935) (federal land bank, for purposes of susceptibility to judicial process absent express congressional provision). As the Assistance Board was created and empowered by Congress to refinance the land banks, it would be surprising if, regardless of other characteristics, it were not also a federal instrumentality. Indeed, Congress has expressly declared it to be "a Federally chartered instrumentality of the United States", 12 U.S.C. § 2278a(a), and Congress is the sole source of "all the faculties and capacities which [it] possesses," *Osborn*, 22 U.S. at 825. Under the logic of *Osborn*, this would seem to be enough. For what it may be worth, however, we note a little of the very broad scope of federal involvement. The Board is directed by presidential appointees (two of whom are cabinet members); its officers and employees are "hired, promoted, compensated and discharged in accordance with title 5, United States Code", see, e.g., Pub. L. No. 101-161, Title V, 103 Stat. 981 (Nov. 21, 1989); it is exempt from most taxes, see 12 U.S.C. § 2278a-11; and the Treasury guarantees the principal of its bonds, see *id.* § 2278b-6. It seems clear that the Assistance Board is a federal instrumentality for purposes of finding under *Osborn* that actions to which it is a party arise under the federal law.

The Land Bank and the Land Bank Association argue that Williams's claims against them are moot, on the

ground that they are not only bankrupt but so bereft of resources that general unsecured creditors have no chance whatever of being paid. See *Federal Land Bank v. Federal Intermediate Credit Bank*, 128 F.R.D. 182, 185 (S.D. Miss. 1989) (indicating that general creditors of the Land Bank have no chance of recovery); *Adams v. RTC*, 927 F.2d 348, 354-55 & n.16 (8th Cir. 1991) (claim moot where it is absolutely certain that collection is impossible), *aff'g* 731 F. Supp. 352, 357 (D. Minn. 1990); *FSLIC v. Locke*, 718 F. Supp. 573, 586-87 (W.D. Tex. 1989) (claim against receiver moot where it has "no funds"). We need not address the mootness argument, however. Williams's claim against the Assistance Board is based on the premise that it tortiously induced the Land Bank and Land Bank Association to commit their alleged wrongs. As we reject that claim on the ground that there were no such wrongs, finding the other claims moot would not alter our decision.

* * *

Plaintiff asserts that Mississippi law controls. The defendants say that federal law is applicable, but they also argue that there is no difference between the federal and Mississippi law. Moreover, they cite *United States v. Kimbell Foods, Inc.*, 440 U.S. 715 (1979), suggesting that in invoking federal law they intend that its content is to be found, as in *Kimbell*, in state law. As we agree with the defendants that plaintiff loses under the law that she herself has invoked (Mississippi's), we need not sort out the possible arguments for use of federal common law.

In the first of the eight counts of her complaint, Williams charged the defendants with breaching their

fiduciary duties when the Land Bank Association (on behalf of the Land Bank) rejected her first proposal to sell her plantation. Mississippi cases do not flatly rule out the possibility of finding mortgagees generally subject to a fiduciary duty to their mortgagors. For instance, the Mississippi supreme court has suggested that the two "are in a relationship of trust". See *First American Nat'l Bank v. Mitchell*, 359 So.2d 1376, 1380 (Miss. 1978). But that case involved fraudulent misrepresentations by the mortgagee's officer, see *id.* at 1378-79, not conduct that could be attacked only as a breach of a heightened duty of care. And other opinions suggest that the court would ultimately refrain from creating such a duty. For example, in *West Point Corp. v. New N. Miss. Fed. Sav. & Loan Ass'n*, 506 So.2d 241, 244 (Miss. 1986), that court declined to read the UCC's provision on impairment of collateral (Miss. Code Ann. § 75-3-606 (1972)) to create a duty in a mortgagee to look after or care for mortgaged real estate, and in doing so relied on *American Bank of Commerce v. Covolo*, 88 N.M. 405, 540 P.2d 1294 (1975), which holds that a bank does not owe a fiduciary duty to its debtors under the UCC. The court reasoned that the proposed duty would have an extremely "chilling effect" on readiness to loan, see *West Point*, 506 So.2d at 244, a consideration also at work here: the costs of lending would rise sharply if lenders were obliged to give their borrowers' interests the sort of priority inherent in a fiduciary duty. Compare *Market Street Associates Ltd. Partnership v. Frey*, 941 F.2d 588, 593-96 (7th Cir. 1991). And in *White v. Hancock Bank*, 477 So.2d 265, 271 (Miss. 1985), the court held that in the absence of a confidential relationship, a bank would have no fiduciary duty to its depositor

requiring it to ascertain the validity of a check before routing it to the drawee bank. See generally Robert C. Williamson & Brenda Kay Tanner, Lender Liability in Mississippi: A Survey, Comparison and Comment, 57 Miss. L.J. 1, 21-35 (1987). See also *Production Credit Ass'n v. Ista*, 451 N.W.2d 118, 121 (N.D. 1990) (Production Credit Association does not owe fiduciary duty to borrower/shareholder except under special circumstances). Williams alleges no facts suggestive of a special relationship; and she cites no cases supporting her claim that an agricultural cooperative owes a fiduciary duty to its members.

Williams's second count charged the defendants with breaching the loan agreement. One clause made the loan "subject to the Farm Credit Act of 1971 and all acts amendatory thereof or supplementary thereto," including, the parties agree, relevant administrative regulations. The Assistance Board argues that neither the statutes nor the regulations create enforceable duties, and it relies on cases that hold that no private right of action exists under the Farm Credit Act of 1971 or the Agricultural Credit Act of 1987. See *Zajac v. Federal Land Bank*, 909 F.2d 1181 (8th Cir. 1990) (en banc) (citing cases). Assuming that to be correct, however, there would still be the possibility that by contract the Land Bank took on an enforceable obligation running parallel to the statutory and regulatory provisions. Cf. *Mendel v. Production Credit Association of the Midlands*, 862 F.2d 180, 183 (8th Cir. 1988) ("even where a federal act does not create a private cause of action for violation of the standards it prescribes, it may be that conduct violating the standards of conduct will give rise to a state common law cause of action"). Here, however,

even assuming Mississippi law would give that effect to the loan agreement,[3] plaintiff has failed to make out a violation of the statute or regulations.

Plaintiff's claim rests essentially on a vague statement in the "Loan Policies and Operations" of the farm credit system:

> The objective shall be to provide borrowers with prompt and efficient service with respect to actions in such areas as . . . partial release of security . . . . Procedures shall provide for . . . prompt exercise of legal options to preserve the lender's collateral position or guard against loss.

12 CFR § 614.4510(d)(1). The gist of the claim appears to be that the defendants' rejection of the Duncan Williams proposal denied plaintiff "prompt exercise" of a right to "preserve [her] collateral position or guard against loss", and that their delay on the Henderson offer breached a duty to be "prompt".

In fact, however, a specific provision of the statute *required* the defendants to reject the Duncan Williams deal. The Farm Credit Act of 1971 as in effect when Williams sold her land stated that "[l]oans originated by a Federal land bank . . . shall not exceed 85 per centum of

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[3] We also continue our assumption that Mississippi law so construed would be applicable. Compare *United States v. Little Lake Misere Land Co.*, 412 U.S. 580 (1973) (federal law governs acquisition of land by federal government for wildlife refuges when Louisiana law is "plainly hostile to the interests of the United States" and "would deal a serious blow to the congressional scheme," *id.* at 597).

the appraised value of the real estate security." 12 U.S.C. § 2017 (1982).[4] And the regulations specify that this minimum relation must prevail throughout the life of the loan, so that it would apply to the residual loan after a release of the original collateral. See 12 CFR § 614.4180(b) (1986) ("The outstanding loan balance on any loan shall not at any time during the life of the loan exceed 85 percent . . . of the appraised value . . . [of] the primary real estate security."). The sale to Duncan Williams would have brought the plaintiff's debt down to $422,183.10. For such a loan the statute would require real estate collateral of nearly $500,000, while the land plaintiff offered was worth only $320,000 by her own reckoning. The additional proffered collateral, as it was not in the form of land, obviously could not satisfy Congress's insistence on "real estate security". If the bromides of 12 CFR § 614.4519(d)(1) created any legally enforceable duties, they could not overcome the specifics of the statute.

Williams now argues that the defendants cannot invoke the 85% rule because they had repeatedly ignored it in the past. Even if the pattern were as Williams claims, we would reject the argument. Whatever Mississippi might do by way of incorporating statutory obligations into the contract, that incorporation could not extend to the point of requiring that a federal agency, having once or even many times violated its enabling statute, should thereafter be perpetually obliged to continue doing so. The extreme judicial reluctance to apply estoppel against the government arises out of a concern that otherwise

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[4] For the current version, as amended by Agricultural Credit Act of 1987, see *id.* § 2018(a)(1)(A).

negligent or dishonest officials could bring about violations of law by making misrepresentations. See *Office of Personnel Management v. Richmond,* 110 S. Ct. 2465 (1990). Plaintiff's proposed rule would engender illegality on a far greater scale, and for far less equitable justification.

Williams cites several cases for the rule that "what a party consistently does . . . is the best evidence of what the contract requires him to do." but these cases just say that parties' conduct after the signing of what later proves to be an ambiguous contract may be used as evidence of their intent. See, e.g., *Kight v. Sheppard Building Supply, Inc.*, 537 So.2d 1355 (Miss. 1989). Williams does not allege that the defendants had previously refrained from applying the 85% rule against *her.* Perhaps she means that custom should inform our construction of the contract language. But in Mississippi the parole evidence rule does not permit extra-contractual evidence to nullify an unambiguous provision, see *Cherry v. Anthony, Gibbs, Sage,* 501 So.2d 416, 419 (Miss. 1987), and Williams identifies no relevant ambiguity in the 85% rule.

As for the two months the defendants took to approve the Henderson transaction, we find no violation of any contractually imposed duty to be "prompt". Williams offers neither analysis nor case law to suggest that the period was not reasonable, given the scale and complexity of the transaction. Recycled as a claim of negligence in the fifth count, the delay claim fares no better.

Williams's third and fourth counts assert a want of good faith. She offers nothing to support the claim, however, except that the Duncan Williams offer that the defendants rejected was better for her and for them than

the Henderson offer they approved. If true, that would prove that the defendants made a mistake (assuming they could lawfully have accepted the Duncan Williams transaction), not that they lacked good faith.

The other counts in the complaint fall in short order. Because none of the defendants did anything wrong with respect to the Duncan Williams offer and the Jimmy Henderson sale, they could not have committed the torts of intentionally or negligently inflicting emotional distress on the plaintiff (the sixth count), intentionally interfering with her contracts and business expectancies (the seventh), or intentionally exerting unlawful control over her business affairs (the eighth).[5]

* * *

Accordingly, we affirm the judgment dismissing the complaint.

So ordered.

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[5] Williams cites no case in which a Mississippi court has recognized any such tort. Cf. Williamson & Tanner, *supra*, at 48 ("No published Mississippi decision has considered the imposition of liability on a lender for interference in its borrower's management relations. Given [a] lender['s] legitimate interests in the operations of its borrowers, Mississippi courts should think twice before [they do so].").

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

KATHLEEN SAUNDERS WILLIAMS, INDIVIDUALLY, AND KATHERINE SAUNDERS WILLIAMS, EXECUTRIX OF THE ESTATE OF ELIZABETH GEORGE SAUNDERS, DECEASED,	)	Civil Action No. 88-888
Plaintiffs,	)	(Filed Jan. 31, 1990)
v.	)	
FEDERAL LAND BANK OF JACKSON, FEDERAL LAND BANK ASSOCIATION OF JACKSON,	)	
- and -	)	
FARM CREDIT SYSTEM ASSISTANCE BOARD, AS SUCCESSOR IN INTEREST TO THE FARM CREDIT SYSTEM CAPITAL CORPORATION,	)	
Defendants.	)	

MEMORANDUM OPINION AND
ORDER DISMISSING COMPLAINT
(Rule 12(b) (6), Fed. R. Civ. P.)

Barrington D. Parker, Senior District Judge:

BACKGROUND

This is an action initiated by plaintiffs, residents and citizens of the State of Mississippi, against the Federal Land Bank of Jackson ("FLB"), its parent association, the Federal Land Bank Association of Jackson ("FLBA"), the Farm Credit System Capitol Corporation ("Capitol Corporation"), a company created to advise and assist the local institutions and the Farm Credit System Assistance Board ("Assistance Board"), a successor in interest to the Capitol Corporation.

The plaintiffs' amended complaint alleges that defendants wrongfully refused to release security in certain farm land serving as collateral for plaintiffs's indebtedness to the Federal Land Bank of Jackson ("Bank") and that the refusal caused plaintiffs to suffer injury. They seek relief under theories of breach of contract and torts law, including: intentional infliction of emotional distress, interference with business expectancy, negligence and breach of duty.

Plaintiff Kathleen Saunders Williams, individually, alleges that she has, as a direct and proximate result of the defendants' conduct, suffered severe emotional distress which has manifested itself in diminished familial relations, neglect of business and family responsibilities, as well as various other psychological and physical problems.

Defendants have moved to dismiss the amended complaint for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. Rule 12(b) (6). For defendants to prevail on this motion to dismiss, it must appear that plaintiffs can

prove no set of facts in support of their claims which would entitle them to relief. Dismissal is appropriate only if, upon viewing the allegations of the pleadings in the light most favorable, it appears as a matter of law that plaintiffs cannot prevail under any set of facts. *Jenkins v. McKeithen*, 395 U.S. 411 (1969).

For the reasons discussed below, the Court decides that the defendants' motion to dismiss should be **granted.**

ANALYSIS

A. Lack of Subject Matter Jurisdiction

The amended complaint alleges that "[j]urisdiction is vested in this Court by virtue of 12 U.S.C. § 2012(4), 12 U.S.C. § 2033(4), 12 U.S.C. § 2258 [portions of the Farm Credit Act of 1971, ("Act") as amended] * * * and [12] C.F.R. § 611.1142(b) [regulation promulgated under the Act]." The amended complaint also discloses that plaintiffs rely on an alleged violation of another regulation promulgated under the Act, 12 C.F.R. § 614.4510(d) (1), as the foundation for all of the causes of action against the defendants. The amended complaint clearly puts forward the Act as the vehicle for relief.

However, several courts have concluded, and indeed plaintiffs have conceded, that no implied right of action exists under the Act. *Bowling v. Block*, 785 F.2d 556, 557 (6th Cir. 1986); *Smith v. Russellville PCA*, 777 F.2d 1544, 1546-48 (11th Cir. 1985); *Kolb v. Naylor*, 658 F. Supp. 520, 525 (N.D. Iowa (1987). Thus, this Court lacks subject

matter jurisdiction to hear plaintiffs' complaint.[1] Nevertheless, because plaintiffs assert that their action is based in common law, the Court considers the other ground for dismissal advanced by defendants.

Defendants are federally chartered instrumentalities, governed and regulated by federal statutes and by rules and regulations promulgated by the Farm Credit Administration ("FCA"), which is an independent agency in the executive branch of the United States government. The FCA determined that these defendants were insolvent and, on May 20, 1988, it appointed a receiver pursuant to authority vested in it by 12 U.S.C. § 2183(b). The duties, powers and authority of the receiver are prescribed in 12 C.F.R. §§ 611.1161 and 611.1171. These two sections of the FCA regulations provide for an administrative adjudication of creditors' claims against these defendants.

However, the Plaintiffs have neither availed themselves of, nor exhausted, their administrative remedies. Therefore, this Court also rules that it lacks subject matter jurisdiction insofar as the complaint purports to assert a cause of action against these defendants.

For all the above reasons, **the complaint should be dismissed for lack of subject matter jurisdiction.**

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[1] Moreover, the damages claimed by plaintiffs are highly speculative and not causally related to the actions allegedly carried out by defendants. Plaintiffs fail to meet the standing requirements articulated in Public Citizen v. Lockheed Aircraft Corp., 565 F.2d 708 (D.C. Cir. 1977).

B. Failure to State a Claim

Loan servicing policies and procedures of Farm Credit System institutions are governed by the general criteria found in 12 C.F.R. § 614.4510(d) (1):

> The objective shall be to provide borrowers with prompt and efficient service with respect to actions in such areas as * * * partial release ofsecurity * * * Procedures shall provide for- * * * prompt exercise of legal options to preserve the lender's collateral position or guard against loss.

Plaintiffs argue that this regulation, as well as sections of internal Bank policy manuals, were incorporated into their original loan contract.

The court will assume this allegation to be true in respect to the pending motions. Even so, plaintiffs' conclusion that the regulation imposed a duty upon defendants to release the collateral securing their loan is incorrect. The regulation is a statement of policy and does not impose mandatory criteria for the release of collateral. Therefore, the regulation cannot serve as a basis for requiring defendants to release collateral in this case. *See Redd v. Federal Land Bank of St. Louis*, 851 F.2d 219, 222 (8th Cir. 1988); *Smith v. Russellville PCA*, 777 F.2d 1544, 1546-48 (11th Cir. 1985).[2]

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[2] The directive to Farm Credit System institutions to establish procedures to preserve a lender's collateral position and guard against loss also undercuts plaintiffs' position that the regulation imposes a duty on System institutions to release collateral.

Likewise, the policies in the internal Bank manuals do not require that a borrower's collateral be released. If anything, the Bank manuals would require the defendants to *refuse* the specific request to release collateral made by plaintiffs. The Credit Operations Manual of Federal Land Bank Association of Jackson provides that a partial release *may* be granted *only* if the loan on the security remaining after granting the release is within statutory limitations. Section 1.10 of the Act, 12 U.S.C. § 2018, provides that loans originated by a federal land bank shall not exceed 85 per centum of the appraised value of the real estate security. However, by its own terms, the amended complaint shows that the collateral allegedly offered to defendants in this case fell far short of this security requirement.[3]

Thus, plaintiffs are complaining in this case of nothing more than defendants' proper exercise of business judgment in allegedly refusing plaintiffs' request to release collateral. Such conduct cannot serve as the basis for any claim of breach of contract or covenant of good faith, *Penthouse Int'l. Ltd. v. Dominion Fed. Sav. & Loan Ass'n*, 855 F.2d 963 (2d Cir. 1988), nor can an allegation of

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[3] Farm Credit Administration regulations provide that the value of non-real estate security "shall be considered only for collateral protection and may not be included in the value of the security upon which the loan is based." 12 C.F.R. § 2614.4230(b). Plaintiffs' alleged collateral offer consisted of real estate valued at $320,000 to secure a $422,000 loan. The Bank manual, which plaintiffs assert formed the basis of their "justifiable expectations," required a first lien on real estate worth approximately $500,000 before defendants could even *consider* a partial release.

that conduct meet the threshold for stating a claim sounding in tort, negligence or breach of duty. *Matter of Benton Trucking Serv., Inc.*, 21 B.R. 574, 577 (Bankr. W.D. Mich. 1982).

Plaintiffs were permitted to engage in limited discovery after their original complaint was dismissed to provide them with an opportunity to establish privity between the plaintiffs and the Assistance Board. In this amended complaint, plaintiffs now assert an "alter ego" doctrine to place the Farm Credit System Capital Corporation ("Capital Corporation"), predecessor in interest to the Assistance Board, in privity with their loan contract. Aside from the fact that the Capital Corporation did not exist at the time the loan contract was executed, plaintiffs' reliance upon an alter ego theory is misplaced because (1) Plaintiffs can produce no authority for the novel proposition that one federal instrumentality can function as the alter ego of another; and (2) the facts alleged by plaintiffs do not state, as a legal matter, an alter ego relationship between the two entities. *Labadie Coal Co. v. Black*, 672 F.2d 92, 96-99 (D.C. Cir. 1982). In sum, plaintiffs were unable to strengthen their complaint with the aid of the permitted discovery.

Additionally, once a federal land bank has properly determined whether or not a particular borrower's offer of debt refinancing should be accepted, this Court will not second-guess that determination. *See Perez v. Jefferson Standard Life Ins. Co.*, 781 F.2d 475, 479-80 (5th Cir. 1986); *Federal Land Bank of Wichita v. Read*, 237 Kan. 751, 703 P.2d 777, 780 (1985).

Plaintiffs argue that more discovery is needed to ascertain how their loan was treated by a comparison with other customers. However, they overlook the fact that the discovery they have undertaken has produced evidence which indicates that *no* requirement to release collateral was ever incorporated into their loan contract. Because the defendants' actions were perfectly consistent with – if not required by – the Act, FCA regulations, and the Bank manual, purportedly incorporated into plaintiffs' original loan contract, the Court can find no grounds to allow plaintiffs to engage in unjustified wide-ranging discovery.

For the reasons here stated, it is hereby **ORDERED** that defendants' motions to dismiss are **granted** and this action is **dismissed with prejudice.**

SO ORDERED, this 31 day of January, 1990.

/s/ Barrington D. Parker
Barrington D. Parker
Senior United States
District Judge

APPENDIX D

A New S&L Venue Game
By Stephen W. Grafman

An obscure clause in the 1989 FIRREA legislation permits the Resolution Trust Corp. to uproot cases from their relevant locality and handle them in Washington, D.C.

MORE THAN a year after passage of the Financial Institutions Reform, Recovery and Enforcement Act of 1989, a little-noticed portion of this legislation has attracted increasing attention. This provision, 12 U.S.C. 144a (1) (3), gives the Resolution Trust Corp., in its capacity as successor to a failed savings-and-loan institution, authority to remove all such cases in which it becomes a litigant from state court, anywhere in the United States, to a single forum – the U.S. District Court for the District of Columbia. So far, upwards of 100 or so such cases have been removed to the District of Columbia, with the potential for many more to come.

One can only wonder whether Congress truly appreciated its full impact. At least one District of Columbia federal judge, Gerhard A. Gesell, has noted that this FIRREA provisions is part of "a less than precisely worded statute." Indeed, it seems difficult to fathom why Congress would afford the RTC the right to remove to the District of Columbia every state court case in which the RTC finds itself a party in its capacity as successor-in-interest to the affairs of a troubled thrift, when there is no central federal matter at issue in the large majority of these cases. In fact, these cases are often purely local in nature.

The legislative directive under consideration, moreover, stands in striking contrast to a now-superceded earlier provision, (12 U.S.C. 1730 [k][1][c]). This pre-FIRREA provision provided RTC's predecessor, the Federal Savings and Loan Insurance Corp., with a right of removal from a state court to a U.S. district court "for the district and division embracing the place where the same is pending by following any procedure for removal now or hereafter in effect."

There is nothing in the history of the present legislation, moreover, that contradicts the more restrictive language of this new FIRREA provisions. Yet, language and legislative history notwithstanding, Judge Gesell was prompted to opine:

> There is no indication that congress intended by enacting the removal provision of FIRREA to bring in every sort of local case to this court, no matter how intertwined with local affairs and local laws. Counsel for RTC has argued in other removed cases before this Court that Congress envisioned that this Court would develop specific expertise in RTC cases, but Congress could not conceivably have envisioned that the trial judges here would become an expert in the laws of all 50 states and territories.

The general counsel of the House Banking Committee, with knowledge of the legislative drafting at issue, reportedly is of a somewhat different persuasion. Her views, as reported in several accounts, are to the effect that FIRREA's removal language was intended to give RTC lawyers a *choice* as to which federal court to remove a case to, and was *not* designed to limit the RTC to the federal district court in Washington.

Regardless of rationale, though, litigants throughout the United States are hardly pleased to learn that their cases summarily can be removed to Washington, D.C., by the RTC. Similarly, the federal judiciary in Washington, faced with an influx of such cases, is equally, if not more, disenchanted. Indeed, Stanley Harris, a District of Columbia federal judge, looking toward corrective clarification, reportedly has called for the amendment of this FIRREA provision. Yet, remedial legislation does not appear to be in the immediate offing.

So what should be done? Maybe nothing; after all, in today's emotionally charged climate, some may ask why one should sympathize with the S&L industry. "They deserve it," may be the rejoinder. Yet, emotion aside, "they" often are innocent third parties with claims (frequently of a localized nature) against a defunct or otherwise insolvent S&L, newly represented by an RTC standing in the shoes of the ousted thrift.

Intentionally or not, FIRREA legislation can create a highly eccentric Rube Goldberg cartoon version of due process.

ACCORDINGLY, EVEN if the District of Columbia federal court is able to digest this increased caseload, the fundamental question remains: Is it fair to litigants who find themselves faced with the prospect of pursuing localized claims in what often will be a geographically remote forum in the nation's capital? With this question in mind, yet another member of the District of Columbia federal

judiciary, Judge Thomas F. Hogan, recently opined that "Congress would be wise to revisit the FIRREA removal provisions to consider whether a federal forum is necessary in every case involving RTC (particularly those involving issues of state law)."

This FIRREA provision, when viewed in the context of various cases transferred to the District of Columbia, clearly runs counter to traditional concepts of jurisdiction venue, *forum non conveniens* and removal, as well as traditional concepts of due process. That is, the general federal removal statute allows removal under appropriate circumstances from a state to a federal court, but at the same time mandates such removal to the federal court in that *same* jurisdiction.

Federal venue statutes are, for the most part, intended to provide a meaningful nexus to the court in which the case will be litigated. The concept of *forum non conveniens*, as recognized in federal law, serves as an equitable check upon the plaintiff's forum selection, allowing transfer to a more appropriate forum when concepts of fairness require such an approach. Specifically, this enactment provides that "for the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought" (28 U.S.C. 1404 [a]). Yet under FIRREA, RTC removal authority mandates transfer to the District of Columbia without regard for "the convenience of parties and witnesses" or, indeed, "the interests of justice," among other statutory considerations.

To surmount this problem, various members of the District of Columbia federal judiciary have opted to read the FIRREA removal/venue provision in tandem with Sec. 1404(a), leading in practical application to what, for lack of a better description, may become known as S&L hopscotch or the RTC shuffle. That is, a case is first removed by RTC from a state court to the federal court in Washington, D.C., per FIRREA; once in Washington, it then is transferred, per Sec. 1404(a), this time to yet another federal court, most often in the state from which it was removed.

This result occurred, for example, in a recently reported lawsuit involving the alleged wrongful termination of a former S&L executive. There the case wound its way through a labyrinth of transfers, traveling from a state court in Otter Tail County, Minn., to the federal court in the District of Columbia, and finally to the federal court back in Minnesota, the state from which this judicial odyssey began. This time-consuming and convoluted transfer procedure caused D.C. federal Judge Hogan to seriously question the congressional wisdom that necessitates removal to the District of Columbia, so that the federal court in Washington can then, and only then, turn the case around and effectuate a transfer to yet another federal forum better suited to the completion of the litigation.

VARIOUS OTHER cases have received such hopscotch justice, and no doubt there will be more. A recent case in point involves litigation respecting alleged breaches of a loan commitment by a thrift now under RTC control. This lawsuit, originally filed in a New Jersey state court, was removed by the RTC to the District of Columbia federal

court. Later, the case was transferred from Washington back to the federal court in New Jersey, where it now is to be tried. Acting in reliance upon the federal change-of-venue provision as set forth in 28 U.S.C. 1404(a), the federal court in the District of Columbia, Judge Thomas Penfield Jackson, stated:

> In exercising its discretion [under 1404(a)], the court may consider such factors as ease of access to evidence that needs to be discovered, the availability of compulsory process, the difficulties inherent in assembling and presenting a case at a remove from office support services, and similar other intensely practical aspects of conducting complex litigation. In this case [the plaintiffs] have identified both specific witnesses and documents which are to be found only in New Jersey and environs; RTC has identified neither in the District of Columbia. Transfer to the District of New Jersey would therefore appear to be "convenient" to both sides, RTC's protestations to the contrary notwithstanding.

Given the RTC removal authority, Judge Jackson's approach (similar to that of Judges Hogan and Gesell) seemingly is both necessary and desirable under the circumstances, and in addition is in accord with respected authority that Sec. 1404(a) "is a comprehensive, general statute applicable to all civil actions without exception."

The FIRREA removal language was designed to give RTC lawyers a choice, not limit them to a Washington court.

But whether intended or not, the current FIRREA removal/venue legislation, even when applied in conjunction with Sec. 1404(a), can and often does lead to uncertainty and, ultimately, to a rather awkward and time-consuming transfer pattern that does more justice to a Rube Goldberg cartoon than to conventional notions of due process.

One thing, though, is crystal clear. This newly evolving game of legal hopscotch makes no sense. Congress should untangle this time-wasting and illogical procedure at the earliest possible time.

APPENDIX E

Citation Database Mode
– F.Supp. – FOUND DOCUMENT DCT P
(Cite as: 1990 WL 212358 (D.D.C.))

Dorothy M. ASBURY, et al., Plaintiffs,

v.

GERMANIA BANK, et al., Defendants.
CIV A 90-1818.
United States District,
District of Columbia.
Nov. 1, 1990.

MEMORANDUM

GESELL

***1** Pending before the Court are numerous motions: one motion to dismiss by one of the many defendants, two motions to withdraw as counsel, three motions for extension of time, eight motions for admission of counsel pro hac vice, one motion for leave to file a sur-response, and, finally, one motion by the plaintiffs to transfer this action to the United States District Court for the Southern District of Illinois. The last of these motions, strenuously opposed by defendants, has been fully briefed and is ripe for decision.

This is one of the many common law and statutory actions removed to this Court in recent months from various state courts across the country pursuant to the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA").

The complaint, a class action, was filed on July 6, 1990, in the Madison County, Illinois Circuit Court.

Named plaintiffs Ralph and Dorothy Asbury, residents of Illinois, sue (1) the Germania Bank ("Germania"), whose principal place of business is in Illinois and executive office is in Missouri, (2) present and former officers and employees of Germania, (3) the federally-chartered Resolution Trust Corporation ("RTC"), and (4) William Graham, the RTC-appointed conservator of Germania's assets. The Asburys claim that Germania and its agents committed fraud and breached fiduciary duties in connection with the Asbury's Purchase in Illinois of a single $5000 subordinate capital note from a Germania employee. The Asburys allege that Germania sold more than $10 million worth of these notes, principally in Illinois. They further allege that on June 25, 1990, RTC, as conservator for Germania, informed Plaintiffs that a moratorium had been placed on payments on the notes pending further investigation.

On August 2, 1990, RTC removed the case to this Court, asserting that this Court has original jurisdiction pursuant to FIRREA, 12 U.S.Cs 1441a(1)(1). The Asburys now move that the instant action be transferred to the United States District Court for the Southern District of Illinois. [FN1] The Asburys cite section 1404(a) of 28 U.S.C., which states:

> FN1. On August 20, 1990, the Asburys and several others filed a second class action alleging essentially the same claims and naming essentially the same group of defendants in the United States District Court for the Southern District of Illinois, Asbury v. Germania Bank, 90CV03513-WDS.

For the convenience of parties and witnesses, in the interests of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

There can be no doubt that the first prong of section 1404(a) would be met by transfer to the Southern District of Illinois. The papers show that this is a case involving Illinois parties, Illinois witnesses, Illinois facts, and Illinois law. It has virtually nothing to do with this jurisdiction. The convenience of the parties and the interests of justice compel transfer. [FN2] indeed, it borders on a violation of due process to compel litigants suing in local courts to prosecute their cases in this distant court.

> FN2. On July 23, 1990, Germania sued the RTC and the Office of Thrift supervision in this Court, Civil Action No. 90-1716, alleging wrongful appointment of a conservator. One of the numerous factual matters mentioned by Germania in its complaint in that case concerns the notes at issue in the instant action, but the Asburys' claims are not a part of that case, and the notes do not appear to be a major component of that case. Therefore, the pendency of that case before this Court does not mandate that the present action be kept here.

The Court further concludes that transferring the instant action meets the other prong of 1404(a): The case "might have been brought" in the Southern District of Illinois. Section 1441a(1)(1) of 12 U.S.C. states:

*2 Notwithstanding any other provision of law, any civil action, suit, or proceeding to which the [RTC] is a party shall be deemed to arise under the laws of the

United States, and the United States district courts shall have original jurisdiction over such action, suit or proceeding.

RTC is and always has been a party to the present action. Accordingly, pursuant to section 1441a (1)(1), the Southern District of Illinois court would have jurisdiction, moreover, venue would be proper in that court pursuant to 28 U.S.C.s 1391(b), because the claim arose there. [FN3]

> FN3. The argument in the briefs is clouded by discussion of Section 1441a(1)(3) of FIRREA, which states:
>
> The [RTC] may . . . remove any such action, suit, or proceeding from a State court to the United States District Court for the District of Columbia, or if the action, suit or proceeding arises out of the actions of the [RTC] with respect to an institution for which a conservator or a receiver has been appointed, the United States district court for the district where the institution's principal business is located.
>
> This provision appears to mandate that some cases – cases not arising out of RTC actions – that could appropriately be transferred by this Court to other federal courts pursuant to 28 U.S.C.s 1404(a) and 12 U.S.C.s 1441a(1)(1) could have been removed from state courts only to this court and not to local federal courts in the first instance. See Piekarski v. Home Owners Savings Bank, 743 F.Supp. 38 (D.D.C.1990). But in any event this is not such a case. This case meets the standard of section 1441a (1)(3) in that it does arise in part out of an action of the RTC, e.g. the RTC's moratorium on payments under

the notes. Accordingly, removal to the Southern District of Illinois from state court would have been proper, just as transfer after removal to this Court is now proper.

There is no indication that Congress intended by enacting the removal provision of FIRREA to bring in every sort of local case to this Court, no matter how significant or insignificant or no matter how intertwined with local affairs and local law. The RTC argues that Congress envisioned that this Court would develop special expertise in RTC cases, but Congress could not conceivably have envisioned that the trial judges here would become expert in the laws of all 50 states and territories. The only specialized knowledge developed to date has related to parsing of the removal provisions themselves, made more difficult by the fact that RTC does not speak with a single voice on this matter but delegates it to an array of private counsel who advance a range of differing arguments against transfer and/or remand.

For the foregoing reasons, plaintiff's Motion to Transfer Action Pursuant to 28 U.S.C. Section 1404(a) will be granted and the case transferred to the Southern District of Illinois. An appropriate Order is attached.

ORDER

Upon consideration of plaintiff's Motion to Transfer Action Pursuant to 28 U.S.C. Section 1404(a), the oppositions thereto, and the entire record herein, and for the reasons stated in the accompanying Memorandum, it is hereby

ORDERED that defendant Resolution Trust Corporation's Motion for Leave to File Sur-Response is granted and the Sur-Response attached as an exhibit thereto shall be filed; and it is further

ORDERED that plaintiffs' Motion to Transfer Action Pursuant to 28 U.S.C. Section 1404(a) is granted; and it is further

ORDERED that the case is transferred to the United States District Court for the Southern District of Illinois.

D.D.C.,1990.

Dorothy M. ASBURY, et al., Plaintiffs, v. GERMANIA BANK, et al., Defendants. ___ F.Supp. ___, 1990 WL 212358 (D.D.C.)

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APPENDIX F

Citation Database Mode
– F.Supp. – FOUND DOCUMENT DCT P
(Cite as: 1990 WL 213057 (D.D.C.))

UNITED SAVINGS BANK, Plaintiff,

v.

Richard N. ROSE, et.al., Defendants.
CIV. A. 90-2378
United States District Court,
District of Columbia.
Nov. 5, 1990.
MEMORANDUM AND ORDER

GESELL

*1 This is one of the many common law and statutory actions removed to this Court in recent months from various state courts across the country pursuant to the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"). Defendants move to remand the case to the state court where it was filed. The motion presents an issue litigated repeatedly by dozens of lawyers in this Court over the past six months. See, e.g., Piekarski v. Home Owners Savings Bank, 743 F.Supp. 38 (D.D.C.1990); Asbury v. Germania Bank, C.A. No. 90-1818, slip op. (D.D.C. November 1, 1990); Kirby v. Mercury Savings and Loan Ass'n., C.A. No. 90-2297, slip op. (D.D.C. November 5, 1990).

The complaint was filed May 23, 1990, in the Circuit Court for Fairfax County, Virginia. Plaintiff United Savings Bank, a Virginia banking corporation, sued Richard N. Rose, a Virginia resident and general partner of a Virginia limited partnership, and three other partners

who are Georgia residents for payment of a note under a guaranty agreement. The guaranty was made pursuant to a loan from United Savings Bank that the limited partnership used to acquire real estate in Virginia. Defendants filed counterclaims.

On July 31, 1990, the Office of Thrift Supervision appointed the federally-chartered Resolution Trust Corporation ("RTC") as receiver of the bank and as conservator of the assets of the bank's successor in interest. On September 27, 1990, RTC removed this action to this Court pursuant to FIRREA, 12 U.S.C. section 1441a(1)(3), asserting that this Court has original jurisdiction pursuant to 12 U.S.C. section 1441a(1)(1). Defendants claim that removal on this basis was not permitted by FIRREA.

Section 1441a(1) of 12 U.S.C. states:

(1) Notwithstanding any other provision of law, any civil action, suit, or proceeding to which the [RTC] is a party shall be deemed to arise under the laws of the United States, and the United States district courts shall have original jurisdiction over such action, suit or proceeding.

(2) The [RTC] shall be substituted as a party in any civil action, suit, or proceeding to which its predecessor in interest was a party with respect to institutions which are subject to the management agreement dated February 7, 1989, among the Federal Savings and Loan Insurance Corporation, the Federal Home Loan Bank Board and the Federal Deposit Insurance Corporation.

(3) The [RTC] may, without bond or security, remove any such action, suit, or proceeding from a State

court to the United States District Court for the District of Columbia, or if the action, suit or proceeding arises out of the actions of the [RTC] with respect to an institution for which a conservator or a receiver has been appointed, the United States district court for the district where the institution's principal business is located. The removal of any action, suit, or proceeding shall be instituted –

(A) not later than 90 days after the date [RTC] is substituted as a party, or

(B) not later than 30 days after the date suit is filed against [RTC], if such suit is filed after August 9, 1989.

*2 Defendants make two arguments against removal. First, they argue that the phrase "any such action" in section 1441(1)(3) refers only to actions designated immediately above in section 1441(1)(2) – i.e. only those involving institutions subject to the referenced 1989 management agreement. It is not clear to defendants whether United Savings Bank is such an institution. Therefore, defendants argue, section 1441(1)(3) did not permit removal of this action.

However, it appears from a fair reading of the statute as a whole that the phrase "any such action," despite the arrangement of paragraphs, refers to those actions described in section 1441a(1)(1), i.e. any case where the RTC is a party, rather than the subset of such cases described in section 1441a(1)(2). Defendants suggest no reason why Congress would have limited RTC's removal rights under FIRREA to those cases where RTC's predecessor in interest, FSLIC, was a party prior to FIRREA's enactment. Moreover, section 1441(1)(3)(B) expressly contemplates removal by RTC of cases filed after the date

FSLIC was replaced and therefore not covered by the 1989 management agreement. The unfortunate arrangement of paragraphs is simply one of several indications that FIRREA is a less than precisely worded statute.

Defendants' other argument is that removal was improper because RTC has failed to formally substitute itself as a party, and therefore the requirements of 1441a(1)(1) and (3) have not been met. However, there is no doubt that RTC had the right to become a party to this action. See 12 U.S.C. ss 1441a(1), 1821(d)(2)(A)(i). The Court will not remand for failure to formally do so; that would elevate form over substance and waste additional time and resources beyond that already expended by the confusing requirements of FIRREA.

Accordingly, remand to state court is not permitted. However, the case may nevertheless be headed back to Virginia, because the Court is inclined to transfer it sua sponte to the United States District Court for the Eastern District of Virginia pursuant to 28 U.S.C. s 1404(a).

Section 1404(a) states:

For the convenience of parties and witnesses, in the interests of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

There can be no doubt that the first prong of section 1404(a) would be met by transfer to the Virginia federal court. The papers show that this is a case involving Virginia parties, Virginia witnesses, Virginia facts, and Virginia law. It has virtually nothing to do with this

jurisdiction. The convenience of the parties and the interests of justice require transfer. Although this case involves a nearby jurisdiction, to argue, as the RTC has in other cases before this Court, that transfer is not permitted by FIRREA would suggest that the statute contemplates repeatedly compelling litigants suing in local courts, no matter how far away, to prosecute their cases in this court. The implications for the Due Process Clause are serious.

*3 The Court further concludes that transferring the instant action meets the other prong of 1404(a): The case "might have been brought" in the Eastern District of Virginia. As indicated above, RTC is essentially a party to the present action. Accordingly, pursuant to section 1441a(1)(1), the Eastern District of Virginia court would have jurisdiction. Moreover, venue would be proper in that court pursuant to 28 U.S.C. s 1391(b), because the claim arose there. [FN1]

FN1. The Court notes that, due again perhaps to unfortunate drafting, the FIRREA removal provision, section 1441a(1)(3), supra, appears to mandate that some cases that could appropriately be transferred by this Court to other federal courts pursuant to 28 U.S.C. section 1404(a) and 12 U.S.C. section 1441a(1)(1) could have been removed from state courts only to this Court and not to local federal courts in the first instance. Thus the statute appears in some cases to require, as will be the case here, removal to this Court first, followed by transfer to a federal court in the state of origin. See Piekarski v. Home Owners Savings Bank, supra.

There is no indication that Congress intended by enacting the removal provision of FIRREA to bring in every sort of local case to this Court, no matter how significant or insignificant or no matter how intertwined with local affairs and local law. Counsel for RTC has argued in other removed cases before this Court that Congress envisioned that this Court would develop special expertise in RTC cases, but Congress could not conceivably have envisioned that the trial judges here would become expert in the laws of all 50 states and territories. The only specialized knowledge developed to date has related to parsing of the removal provisions themselves, made more difficult by the fact that RTC does not speak with a single voice on this matter but delegates it to an array of private counsel who advance a range of differing arguments against transfer and/or remand.

The Court has authority to act sua sponte to transfer a case to another federal district court pursuant to 1404(a). Starnes, v. McGuire, 512 F.2d 918 (D.C.Cir. 1974). The Court will enter an order denying the motion to remand but directing that this case be transferred to the United States District Court for the Eastern District of Virginia unless one or more of the parties shows cause in writing within 14 calendar days of the date of this Order why the Court should not so act.

SO ORDERED.

Order of Transfer

Pursuant to the Court's Memorandum and order dated November 5, 1990, setting forth the Court's analysis and

reasons for transfer, and no party having shown cause why this action should not be transferred, it is hereby

ORDERED that defendants' Motion to Remand is denied; and it is further

ORDERED that this action is transferred sua sponte to the United States District Court for the Eastern District of Virginia pursuant to 28 U.S.C. s 1404(a).

D.D.C., 1990.

UNITED SAVINGS BANK, Plaintiff, v. Richard N. ROSE, et al., Defendants. ___ F.Supp. ___, 1990 WL 213057 (D.D.C.)

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Supreme Court, U.S.
FILED
JUL 6 1992
OFFICE OF THE CLERK

No. 91-1769

In the Supreme Court of the United States

OCTOBER TERM, 1992

KATHLEEN SAUNDERS WILLIAMS, INDIVIDUALLY, AND KATHERINE SAUNDERS WILLIAMS, EXECUTRIX OF THE ESTATE OF ELIZABETH GEORGE SAUNDERS, DECEASED, PETITIONERS

v.

FEDERAL LAND BANK OF JACKSON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

ANTHONY J. STEINMEYER
MATTHEW M. COLLETTE
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether 12 U.S.C. 2278a-3(b), which provides that any action to which the Farm Credit System Assistance Board is a party is "deemed to arise under the laws of the United States" and grants federal jurisdiction over all such actions, is consistent with Article III of the Constitution.

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In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 91-1769

KATHLEEN SAUNDERS WILLIAMS, INDIVIDUALLY, AND KATHERINE SAUNDERS WILLIAMS, EXECUTRIX OF THE ESTATE OF ELIZABETH GEORGE SAUNDERS, DECEASED, PETITIONERS

v.

FEDERAL LAND BANK OF JACKSON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 39a-51a) is reported at 954 F.2d 774. The opinion of the district court (Pet. App. 52a-59a) is reported at 729 F. Supp. 1387.

JURISDICTION

The judgment of the court of appeals was entered on February 4, 1992. The petition for a writ of certiorari was filed on May 1, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Farm Credit System Assistance Board (Assistance Board) is "a Federally chartered instrumentality of the United States" chartered by the Farm Credit Administration. 12 U.S.C. 2278a(a).[1] The purposes of the Assistance Board are "to carry out a program to provide assistance to, and protect the stock of borrowers of, the institutions of the Farm Credit System, and to assist in restoring System institutions to economic viability and permitting such institutions to continue to provide credit to farmers, ranchers, and the cooperatives of such, at reasonable and competitive rates." 12 U.S.C. 2278a-1.[2] The Assistance Board is supervised by a Board of Directors consisting of the Secretary of the Treasury, the Secretary of Agriculture, and "an agricultural producer experienced in financial matters, and appointed by the President, by and with the advice and consent of the Senate." 12 U.S.C. 2278a-2(a). The Assistance Board finances its activities by authorizing the Farm Credit System Financial Assistance Corporation to issue bonds guaranteed by the United States Treasury.[3] 12 U.S.C. 2278a-7(a), 2278b-5(a), 2278b-6. The Assistance Board is exempt from federal, state, and local taxation, except for ad valorem

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[1] Congress by statute has created the Farm Credit Administration as "an independent agency in the executive branch of the Government." 12 U.S.C. 2241. It is administered by a Board of three members appointed by the President with the advice and consent of the Senate. 12 U.S.C. 2242(a).

[2] The Farm Credit System includes the Farm Credit Banks (see 12 U.S.C. 2011), as well as various other institutions chartered by the Farm Credit Administration. 12 U.S.C. 2002(a).

[3] The Farm Credit System Financial Assistance Corporation is also an instrumentality of the United States chartered by the Farm Credit Administration. 12 U.S.C. 2278b.

taxation on real estate it owns. 12 U.S.C. 2278a-11. The Assistance Board will cease to exist as of December 31, 1992. 12 U.S.C. 2278a-12.

2. In 1981, petitioner Kathleen Saunders Williams and Elizabeth George Saunders borrowed $1,309,000 from the Federal Land Bank of New Orleans, predecessor in interest to the Federal Land Bank of Jackson. The loan was secured by a deed of trust on approximately 1400 acres of land in Leflore County, Mississippi known as the Runnymede Plantation. By March 1987, the borrowers were in default, owing $1,236,016.50 in principal, interest, and accrued penalties. The borrowers then approached the Federal Land Bank Association of Jackson (which serviced the loan) with a proposal to sell the Runnymede Plantation and to use a portion of the proceeds to reduce the outstanding balance of the loan to $422,183.10; as security for the remaining loan the borrowers offered a different parcel of property, farming equipment, a cattle herd, and stock. The Association rejected the offer, on behalf of the Bank, acting, according to Williams, at the direction of the Farm Credit System Capital Corporation.[4] Subsequently, petitioners[5] approached the Association with a request that it consent to a sale of the farm, intending to use the proceeds to pay off the debt entirely. After the Association consented, petitioners

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[4] The Farm Credit System Capital Corporation was the predecessor to the Assistance Board. See 12 U.S.C. 2278a, 2278a-9(a). It was involved in the affairs of the Jackson bank because it had been giving financial assistance to that bank at the time of these events. See Pet. App. 41a n.1.

[5] Elizabeth George Saunders had died, and petitioner Katherine Saunders Williams became involved as executrix of Elizabeth George Saunders' estate. See Pet. App. 41a.

sold the collateral and used the proceeds to repay the loan. Pet. App. 40a-42a.

3. On December 22, 1987, petitioners brought this action in the Circuit Court of Leflore County, Mississippi, charging the Association, the Bank, and the Farm Credit System Capital Corporation with various torts and breaches of contract in connection with their response to the two proposed sales of the collateral; petitioners sought damages of more than $1,000,000, including $500,000 for emotional distress.

4. Pursuant to the Agricultural Credit Act of 1987, Pub. L. No. 100-233, § 201, 101 Stat. 1585, the Farm Credit System Capital Corporation was dissolved and replaced in the Mississippi action, as of January 21, 1988, by the Assistance Board. See 12 U.S.C. 2278a; Pet. App. 42a. The Assistance Board removed the case to federal court pursuant to 12 U.S.C. 2278a-3(b), which provides that "any civil action, suit, or proceeding to which the Assistance Board is a party shall be deemed to arise under the laws of the United States, and the United States District Court for the District of Columbia shall have exclusive jurisdiction over such."[6] Petitioner did not contest the removal. In due course, the district court granted the Assistance Board's motion to dismiss the complaint for failure to

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[6] That Section provides:

> Notwithstanding any other provision of law, any civil action, suit, or proceeding to which the Assistance Board is a party shall be deemed to arise under the laws of the United States, and the United States District Court for the District of Columbia shall have exclusive jurisdiction over such. The Assistance Board may, without bond or security, remove any such action, suit, or proceeding from a State court to the United States District Court for the District of Columbia.

state a claim upon which relief could be granted. Pet. App. 52a-59a.

5. The court of appeals affirmed. Pet. App. 39a-51a.[7] Examining its jurisdiction, the court noted that 12 U.S.C. 2278a-3(b) reflected a clear intention to grant federal jurisdiction, which would "prevai[l] if the Constitution permits." Pet. App. 43a. The court concluded that jurisdiction was based on the federal judicial power described in Article III, Section 2 of the Constitution, which extends "to all Cases * * * arising under * * * the Laws of the United States." The court explained that this Court had held in *Osborn* v. *Bank of the United States*, 22 U.S. (9 Wheat.) 738, 822-828 (1824), that this portion of the judicial power extends to all cases involving entities created by the United States, "on the theory that the provision creating the entity is potentially at issue in every such case." Pet. App. 43a-44a. Because the Assistance Board was created by the United States, the Constitution permitted Congress to extend federal question jurisdiction to all cases involving the Assistance Board. Pet. App. 44a-45a.

ARGUMENT

Petitioners' sole claim (Pet. 17-27) is that 12 U.S.C. 2278a-3(b) violates Article III by vesting federal jurisdiction over all cases involving the Assistance Board. That claim is meritless. "As long ago as *Osborn*, this Court held that Article III's 'arising under' jurisdiction is broad enough to authorize Congress to confer federal court jurisdiction over actions involving federally chartered corporations." *American National Red Cross* v. *S.G.*, No. 91-594 (June 19, 1992),

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[7] Justice Thomas was a member of the panel when the case was argued but did not participate in the opinion. Pet. App. 40a n.**.

slip op. 17. Because the Assistance Board was created by the federal government, this rule squarely applies and validates the jurisdictional grant reflected in 12 U.S.C. 2278a-3(b).

Petitioners' contrary arguments are unfounded. First, petitioners err in suggesting (Pet. 18-21) that subsequent statutes and decisions have limited *Osborn*'s reach. Subsequent statutes, of course, cannot alter the breadth of the Constitution, and this Court's cases have not limited *Osborn*'s constitutional holding, but rather, as the *Red Cross* Court noted, have "consistently reaffirmed the breadth of that holding." Slip op. 17-18.[8]

Second, petitioners incorrectly suggest (Pet. 21-24) that Section 2278a-3(b) violates Article III because it is a "pure jurisdictional statute," conferring jurisdiction over cases that otherwise would not involve federal law. This argument simply ignores the Court's dispositive holding in *Osborn*—recently reaffirmed in *Red Cross*—that all cases to which federally chartered instrumentalities are a party involve an ingredient of federal law sufficient to satisfy Article III, Section 2.[9]

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[8] The cases on which petitioners rely, *Gully* v. *First National Bank*, 299 U.S. 109 (1936), and *Wheeldin* v. *Wheeler*, 373 U.S. 647 (1963), are cases interpreting the well-pleaded complaint rule, which is a gloss on the statutory grant of federal jurisdiction over cases "arising under" federal law. As the Court explained in *Red Cross*, that rule "has no applicability" to other jurisdictional grants, such as the constitutional grant at issue in this case. Slip op. 10-11.

[9] In any event, the argument also ignores the facts of this case, in which the Assistance Board had a substantial argument that the dispositive rule of law was based on federal common law. See Pet. App. 45a (declining to determine whether federal law applies, because petitioners' claims were meritless even under state law).

Finally, petitioners contend (Pet. 24-27) that the Assistance Board's charter is inadequate to bring this case within the constitutional grant of jurisdiction over cases arising under federal law. Their only support for this argument, however, is a number of lower court decisions construing *statutory* grants of federal jurisdiction and concluding that those grants did not authorize federal courts to hear certain cases involving federally chartered entities. Nothing in any of those cases supports their argument—in the face of *Osborn*—that the *constitutional* grant of jurisdiction does not allow Congress to extend federal jurisdiction to such cases.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

ANTHONY J. STEINMEYER
MATTHEW M. COLLETTE
Attorneys

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